SENTENCED TO PURGATORY: THE INDEFINITE DETENTION OF MARIEL CUBANS

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"Every nation that grossly violates human rights justifies it by claiming they are acting within their laws."[1]

I. INTRODUCTION

In 1991, sixty incarcerated Cuban[2] immigrants shared their lives and personal stories with me as they struggled to survive within a maximum-security county correctional facility in central Texas.[3] Unwanted by their own country, these men were detained by the Immigration and Naturalization Service (INS) in a correctional facility reserved for individuals awaiting resolution of their criminal cases along with convicted criminals completing their state sentences. Upon review of their immigration status, a few of these Cuban men were released on immigration parole,[4]

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1. Bernard Gavzer, *"Are Human Rights Being Abused in Our Country?,"* PARADE, Dec. 12, 1993, at 6, 8 (quoting speech of President Carter).

2. Although the focus of this paper is the plight of inadmissible Cuban immigrants who are indefinitely detained, other immigrants within the United States share their fate. It is estimated that over 3400 aliens in the United States are in this situation with the majority being from Cuba. *See* Dan Malone, *INS Faulted in Extended Detentions: Agency Defends Lockups Despite Lack of Charges*, THE DALLAS MORNING NEWS, Dec. 12, 1999, at 1A; Barry Schlachter, *Immigrant Felons Become 'Lifers' in Hands of INS*, PORTLAND OREGONIAN, Oct. 29, 1999, at A18; *see also* Interview with D'Ann Johnson, Volunteer Attorney, Political Asylum Project of Austin, in Austin, Tex., (Feb. 5, 1999) [hereinafter Interview with D'Ann Johnson] (on file with *The Scholar: St. Mary's Law Review on Minority Issues*) (reporting that there are almost 4000 indefinitely detained immigrants in the United States with the majority being Cuban). The exact number of inadmissible aliens affected in this area is difficult to determine and it appears that INS itself does not seem to know. *See* Malone, *supra* at 1A (detailing INS refusal to supply information on the number of indefinitely detained). While many Americans have requested a list of names of those indefinitely detained, the INS continues to refuse these requests. *See id.* Ms. Johnson, through a freedom of information request, was informed that there are 88 detained Cubans in the San Antonio District; this includes, Bastrop County Jail, Bastrop Federal Prison, Victoria County Jail and Three Rivers Federal Prison. *See* Interview with D'Ann Johnson, *supra.*

3. During that year, I was the first and only in-house mental health worker employed at this facility. I was hired in response to a successful suicide. The administration told me the 400-bed facility had been built as a maximum-security facility to attract federal contracts. As a result, it was able to detain individuals who were awaiting trial in federal court and considered extremely dangerous by the U.S. Marshall's Office. Consequently, the county contracted with several federal agencies including INS. Of the 400 individuals detained in the facility, approximately 250 were federal detainees, while the remaining 150 were detainees of the county and were awaiting trial for crimes committed within the county, or were state detainees serving short prison sentences. Approximately, one-third of the total population was comprised of women.

4. *See* Palma v. Verdeyen, 676 F.2d 100, 101 (4th Cir. 1982) (stating the Attorney General holds the discretion to temporarily parole an alien into the U.S. for emergent reasons or in the public interest).

while the majority were detained indefinitely in this facility awaiting transfer to other correctional facilities.[5]

Having arrived in the United States with the hope of experiencing "The American Dream," these Cuban men instead found themselves confined to small-enclosed cells, which never saw the light of day. They were allowed to leave these cells only three hours a week to exercise in a slightly larger enclosed room. In fact, the detained were never allowed outside because this was a maximum-security facility,[6] and any visitation was restricted to weekends while contact visits were prohibited.[7] Furthermore, inmates were only provided medical care when they made a written request[8] or when evidence of a serious medical condition was clearly apparent. Mental illness was not considered a serious medical condition. Several Cuban detainees who suffered from mental conditions could not be housed within the general population. These mentally ill individuals were housed in five-by-ten foot windowless segregation cells with only a slot big enough to slide a meal tray inside.[9]

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5. None of the Cubans knew when they were to be released or if they were to be released at all. INS had taken custody of most of these men after their release from prisons where they had successfully completed their prison terms pending the determination of their immigration parole review. INS detained the rest of the Cubans for alleged parole violations.

6. In the Bastrop County Jail in Texas, inmates are allowed to go outside for particular reasons. *See* Interview with D'Ann Johnson, *supra* note 2. However, the administration of this facility has instituted a policy which prohibits the Cuban INS detainees from going outside for any reason because they are considered a high risk for a possible escape attempt. *See id.*

7. None of the Cuban detainees ever had visitors because their families were very far away. INS places individuals where there is space available regardless of where their families are located. *See* Human Rights Watch, *Locked Away: Immigration Detainees in Jails in the United States* (visited Feb. 2, 1999) <http://www.hrw.org/reports98/us-immig/Ins989-02.htm>.

8. At this facility, medical care was available only if requested in writing by the inmate. This limited the amount of medical care received by the inmates because most of the general population was illiterate and at least one-fourth of the inmates, including the Cuban detainees, did not speak English. Most of these inmates spoke Spanish and were illiterate in Spanish as well. Contributing to the limited access of health care to the Spanish-speaking inmates was the fact that only about 10% of the correctional staff spoke Spanish.

9. Inmates were housed in segregation cells primarily as an infliction of punishment for inappropriate behavior. Segregation cells were also used to house inmates that were deemed unsuitable to be housed with the general population. These inmates were housed in segregation cells for their own protection, or to protect the rest of the population. These men and women were locked up 24 hours a day. Their only reprieve from this isolation was the recreation schedule, which allowed them to be in an open-air recreation area for only three hours a week. These segregation cells had built-in bed frames and the lights burned 24 hours a day. One individual who was permanently housed in a segregation cell was a black Cuban man who appeared to be approximately 40 years old. His appearance was shocking. He was very tall and muscular with a wild look in his eyes. I could only

Attempting to understand their continued detention by INS, the Cuban detainees shared their experiences and feelings of sadness, frustration, and betrayal among themselves. They turned to each other for emotional support and together learned to care for each other amid the harsh realities of prison life. In the world of the imprisoned, they had become a family.

One man's struggle to survive seemed particularly hopeless. Edito was a 42-year-old Cuban who had the physical appearance of a 72-year-old man. He exhibited symptoms of mental retardation and severe depression. Initially, he was housed in the general population but was unmercifully teased and physically assaulted by the inmates in his cell. The other Cubans tried to protect him, but they were unsuccessful. After several incidents, the classification officers[10] determined that it was too dangerous for Edito to be housed within the general population, and transferred him to a segregation cell. Edito became increasingly despondent in segregation. He began pulling his hair out and would sit for hours in his shower with the water running over him. Several times, in moments of complete desperation, he tried to set himself on fire.

Edito had the mentality of a young child; he could not speak English, and was illiterate in Spanish. He would speak often of his mother and cry not knowing whether she was alive. In an effort to distract him from his mental anguish, daily visits from the medical staff were instituted.[11] We read to him, tried to play cards with him and let him draw with crayons and pencils.[12]

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imagine how he had become this way. He could speak little English, but was eventually able to relate that he had been in INS detention since he arrived in America in 1980. He spent the entire period of his confinement at this facility housed in a segregation cell. He spent most of the day screaming, singing or babbling incoherently, or begging to be released. During one of his more lucid moments, he told me that INS had imprisoned him for over eleven years. He could not say why he was being detained. Most of the time what he said to me was incoherent, although it was clear that his confinement and mental condition tormented him. Within this facility and the INS bureaucracy, he seemed forgotten. Then one day he simply disappeared. INS officials took him away, probably to the next facility.

10. Here, classification officers were the officers responsible for determining the appropriate housing and "safe mixing" of the inmates.

11. The time spent with Edito was unusual. Although the medical staff was not required to spend the extra time with him, and honestly we did not have the time. Edito's plight filled us with feelings of empathy and compassion which led us to provide extra care.

12. I had worked with Edito and the other Cubans for over a year when I was told by my supervisor that the services provided by the medical staff of this facility were going to be phased out and replaced by services provided by the county health department. The county officials explained that this would save county resources. I was shocked by this decision considering the significant number and the degree of seriousness of the health problems that were experienced by the inmates while I worked there. For example, many

During sessions with Edito, I learned that he had come to the United States in 1980, and spent the majority of his time since arriving in America in INS custody. Edito thought he was detained in this facility for an immigration parole violation. He thought he had broken a rule at the halfway house where he had been living, although he did not know what rule it might have been.

For these Cuban immigrants held by INS, their detention had become a form of purgatory. In limbo, these Cuban men, denied admission and immigration parole and unable to returned to their homeland, were incarcerated for indefinite periods of time. In challenging the legitimacy of their indefinite detention, these immigrants were crippled because they did not have the benefit of constitutional due process protections.[13] Incredibly, United States courts have repeatedly ruled that INS has the authority to indefinitely detain any immigrant who is denied admission and cannot be returned to his homelands.[14] As a result, thousands of Cubans are in correctional facilities throughout the United States.[15]

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inmates experienced health issues such as: diabetes, AIDS, severe heart problems, and pregnancy. I did not believe that an already overburdened county health department could adequately serve these individuals. I was deeply concerned about what would happen to Edito. Leaving Edito alone in that jail was one of the hardest things I have ever had to do because I knew in my heart that he would continue to receive inadequate care and lead a miserable existence.

I received the news of our lay-off with mixed emotions. In some ways, I felt relieved to leave this job. My work as a mental health worker at the jail was always stressful, dangerous and constantly busy. In my inexperience, I didn't realize that I had been placed in an impossible position – four hundred inmates and one mental health worker. What struck me about the inmates was the daily struggle they faced in living their lives. Every individual's situation had a crisis aspect to it. The work was dangerous because a small percentage of the inmates were unstable and unpredictable, becoming violent without any warning. I met with most of the inmates in a makeshift "office" within the heart of the facility with only camera observation for protection. I interviewed the more unstable inmates in the medical section where there were bars between us. Some individuals met with me in their segregation cells. As the first mental health worker hired at this facility, the correctional staff viewed me with deep suspicion. Their attitudes made my job that much more difficult. In time, mutual respect grew between the correctional staff and myself. I think they realized that although I was a "damn do-gooder," I was mindful of security concerns and did my best to work within the framework necessary to ensure the safety of the men and women of the correctional staff who protected me.

13. *See generally* Barrera-Echavarria v. Rison, 44 F.3d 1441, 1449 (9th Cir. 1995) [*Echavarria II*] (noting that excludable aliens have no constitutional due process rights in immigration proceedings that determine their admission or exclusion); Gisbert v. U.S. Attorney Gen., 988 F.2d 1437, 1442 (5th Cir. 1993) (noting that excludable aliens are only entitled to due process rights created by law, not constitutional due process rights).

14. *See, e.g., Echavarria II*, 44 F.3d at 1441; *Gisbert*, 988 F.2d. at 1437; Garcia-Mir v. Meese, 788 F.2d 1446 (11th Cir. 1986); Palma v. Verdeyen, 676 F.2d 100 (4th Cir. 1982); Rodriguez-Fernandez v. Wilkinson, 654 F.2d 1382 (10th Cir. 1981).

15. *See infra* note 101 and accompanying text.

It is on behalf of Edito and those immigrants who share his fate that this comment examines the law which denies them their liberty. This comment will demonstrate that the indefinite detention of Cuban immigrants is punishment. Thus, INS is acting outside its scope of delegated authority and violating the constitutional rights of immigrants who are subjected to a criminal sanction. To prevent the unconstitutional punishment of detained Cuban aliens by INS, this comment proposes that Congress create a mandatory and uniform system of procedural due process modeled after the procedural due process system established by the Kansas Legislature in the Kansas Sexually Violent Predator Act of 1994 (Act).[16] The procedural due process system in the Act is designed to protect the rights of sex offenders who after completing their criminal sentences are then civilly detained for an indeterminate length of time for further psychiatric treatment.[17] Part II will discuss the history of the Mariel Cubans, a large group of immigrants who have experienced indefinite detention within the United States in recent years. Part III will present the legal framework that allows indefinite detention to be imposed by the United States government. Part IV will relate the challenges that have taken place within the Circuit Court of Appeals, while Part V will demonstrate the factors that support the assertion that indefinite detention is punishment. Finally, Part VI will present the *Hendrick's* Model of Statutory Due Process and illustrate how such a model can be adopted by INS to prevent the infliction of punishment and humanely manage the detention of immigrants who have been denied entry and who cannot be deported to their homelands.

II. THE JOURNEY OF THE MARIEL CUBANS

A. *Arriving in America*

On April 5, 1980, several Cubans stormed the Peruvian Embassy in Havana, Cuba seeking asylum.[18] Within days, 10,000 more Cubans were in the Peruvian Embassy seeking asylum as well.[19] In response, President Jimmy Carter extended an invitation to those Cubans seeking refuge to

16. *See* KAN. STAT. ANN. §§ 59-29a01 - 29a19 (1994).

17. *See* Kansas v. Hendricks, 521 U.S. 346, 351-52 (1997).

18. *See* Justiz-Cepero v. Thornburgh, 882 F. Supp. 1572, 1573-74 (D. Kan. 1995); Fabiola Santiago, *The Cuban Who Sparked the Exodus Breaks His Silence*, MIAMI HERALD, Sept. 6, 1998, at A1; Maria Urelia, *Justice Can Be Elusive for Mariel Cubans*, ST. PETERSBURG TIMES, Aug. 20, 1989, at 1D.

19. *See Justiz-Cepero*, 882 F. Supp. at 1573-74 n.10; Santiago, *supra* note 18, at A1; Urelia, *supra* note 18, at 1D.

come to the United States.[20] Fidel Castro, the leader of Cuba, opened the borders allowing Cubans to come to the United States.[21] Under the Attorney General's parole authority,[22] approximately 125,000 Cubans traveled to the United States.[23] Most of these people began their seaward journey from the port city of Mariel, Cuba and became known as the "Mariel Cubans".[24]

This substantial number of Cubans seeking asylum at the same time overwhelmed the resources of the INS,[25] because the INS was required to review each Cuban's suitability status before releasing them from detention where they awaited permission to legally enter the country.[26] Compounding this problem was the fact that several of the Mariel Cubans were immediately denied entry because they lacked the proper entry documentation.[27] A small minority of Mariel Cubans were denied entry based upon allegations that they had committed crimes in Cuba.[28]

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20. *See* Garcia-Mir v. Meese, 788 F.2d 1446, 1448-49 (11th Cir. 1986); MARK S. HAMM, THE ABANDONED ONES: THE IMPRISONMENT AND UPRISING OF THE MARIEL BOAT PEOPLE 52 (1995).

21. *See* HAMM, *supra* note 20, at 50; *see also* Palma v. Verdeyen, 676 F.2d 100, 101 (4th Cir. 1982) (stating that the Cuban government offered criminals the option of fleeing to the United States rather than remaining in prison); STEPHEN H. LEGOMSKY, IMMIGRATION AND REFUGEE LAW AND POLICY 58 (2ed 1997).

22. *See Echavarria II*, 44 F.3d at 1446 (stating that Congress has granted the Attorney General the discretion to allow aliens to enter the U.S. "for emergent reasons or for reasons deemed strictly in the public interest"); *Palma*, 676 F.2d at 103; Rodriguez v. Thornburgh, 831 F. Supp. 810, 812 (D. Kan. 1993) (declaring that "Congress has delegated broad authority to the Attorney General" to exclude aliens).

23. *See* Morell-Acosta v. INS, No. 94-70442, slip op. 1 (9th Cir. May 31, 1996); *Palma*, 676 F.2d at 101; Rodriguez-Fernandez v. Wilkinson, 654 F.2d 1382, 1385 n.1 (10th Cir. 1981); LEGOMSKY, *supra* note 21, at 58.

24. *See Morell-Acosta*, No. 94-70442, slip op. at 1; Gisbert v. U. S. Attorney Gen., 988 F.2d 1437, 1439 n.3 (5th Cir. 1993); Moret v. Karn, 746 F.2d 989, 990 n.1 (3d Cir. 1984); LEGOMSKY, *supra* note 21, at 58; *see also Rodriguez*, 831 F. Supp. at 811 (relating the fact that the Mariel Cubans left from the port of Mariel, Cuba).

25. *See* HAMM, *supra* note 20, at 53-54; *see also* LEGOMSKY, *supra* note 21, at 59 (stating that the resources of INS were stretched to accommodate the needs of the Mariel Cubans).

26. *See In re* Mariel Cuban, 822 F. Supp. 192, 194, (M.D. Pa. 1993) (explaining that Mariel Cubans were placed in custody pending a decision on their status); HAMM, *supra* note 20, at 54.

27. *See Rodriguez*, 831 F. Supp. at 811; *Moret*, 746 F.2d at 990; HAMM, *supra* note 20, at 53.

28. *See* Garcia-Mir v. Meese, 788 F.2d 1446, 1448 (11th Cir. 1986); *Palma*, 676 F.2d at 101 (explaining that although approximately 25,000 Mariel Cubans admitted having some criminal history in Cuba only 2000 Mariel Cubans had committed crimes serious enough to prolong detainment after the initial detention period). *See generally Rodriguez-Fernandez*, 654 F.2d at 1384; HAMM, *supra* note 20, at 60-62 (describing a Cuban immigrant with a criminal history who was detained in the United States).

Although the United States Attorney General had the authority to detain these people until the INS had made a formal determination of their admissibility,[29] the Justice Department expanded immigration parole in relation to the Mariel Cubans due to the lack of adequate detention space.[30] As a result, the majority of the Mariel Cubans were released into the community and granted immigration parole until they could have a formal hearing.[31] These Cubans still retained the status of immigrants awaiting permission to enter the United States, in spite of their physical presence within the country.[32] The remaining Mariel Cubans were denied immigration parole and were held to await deportation to Cuba.[33]

B. *The Consequences of Racism & Poverty*

After the first week of the Mariel boatlift in 1980, the problems between the Mariel Cubans and the United States government began. INS officials noticed that the Cuban men appeared "rougher" than the first Cubans to arrive in the boatlift.[34] These officials concluded that the Cuban government was releasing hardened criminals from its prisons and the mentally ill from its psychiatric hospitals.[35] Castro denied these accusations.[36] The Carter Administration ignored his responses and soon the Mariel Cubans became the victims of a propaganda campaign that made them appear dangerous and undesirable. The media was saturated with stories characterizing the Mariel Cubans as "murderers, vagrants, homosexuals, and scum".[37] Contributing to this characterization was a report

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29. *See* Immigration and Nationality Act of 1952 § 212(a)(5)(A), 8 U.S.C.A. § 1182(d)(5)(A) (West 1999) (stating that immigrants "applying for admission to the United States", may be paroled by the Attorney General); *Palma*, 676 F.2d at 104 (stating that the Attorney General has discretion to detain "when the alien cannot be returned and the Attorney General finds him unsuitable for parole"); Cruz-Elias v. U. S. Attorney Gen., 870 F. Supp. 692, 694 (E.D. Va. 1994) (noting that although Congress has not expressly authorized or forbidden the detention of excluded aliens, it has implicitly authorized detention of excluded aliens).

30. *See* LEGOMSKY, *supra* note 21, at 60; *see also* HAMM, *supra* note 20, at 53-57.

31. *See Echavarria II*, 44 F.3d at 1443; *Rodriguez-Fernandez*, 654 F.2d at 1385 n.1; *Rodriguez*, 831 F. Supp. at 811.

32. *See* Vargas v. Swan, 854 F.2d 1028, 1029 (7th Cir. 1988).

33. *See Palma*, 676 F.2d at 101; *Rodriguez-Fernandez*, 654 F.2d at 1385; HAMM, *supra* note 20, at 61-65.

34. *See* HAMM, *supra* note 20, at 51.

35. *See id.* at 51; LEGOMSKY, *supra* note 21, at 58; Urelia, *supra* note 18, at 1D.

36. *See* HAMM, *supra* note 20, at 51. Furthermore he stated that these people were " anti-social lumpen' (socially displaced individuals) and 'anti government reactionaries." *See id.*

37. *Id. See generally* Milton Mayer, *Massaging the News*, PROGRESSIVE, Aug. 1980, at 44-45 (criticizing newspapers and newswires for inaccurately reporting events in regard to Mariel Cubans arriving in Florida).

by an INS official to the media stating that 85% of the Mariel Cubans were "convicts, robbers, murderers, homosexuals and prostitutes".[38] This public defamation led the Ku Klux Klan to have protest rallies at the site of resettlement camps around the United States,[39] and to outbreaks of racial violence in the streets of Miami where most of the Mariel Cubans settled.[40]

The established Cuban community had difficulty accepting the Mariels because of the criminalization by the media and the government, as well as the many differences between them.[41] The Cubans who came to America after Castro came into power in the 1950's were generally professionals, well educated, and members of the upper class.[42] In contrast, the Mariel Cubans were at the bottom of the economic class system of Cuban society.[43] Most of the Mariel Cubans were members of the working class: construction workers, mechanics, and farmers, with nearly half of them being black.[44] These black Cubans neither fit in with the Cuban community nor with the African-American community.[45] The cultural rift between African Americans and Mariel Cubans arose in part from the differences in their religious practices. The majority of the Mariel Cubans practiced an African-based religion known as Santeria.[46] Misrepresentations of a number of Santeria's rituals served to further alienate the Mariel Cubans from an American society based in Christian-Judaic tradition.[47]

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38. HAMM, *supra* note 20, at 56.

39. *See id.*; Dennis A. Williams et al., *The Cuban Tide Is a Flood*, NEWSWEEK, May 19, 1980, at 28-29.

40. *See* HAMM, *supra* note 20, at 76. Furthermore, racism expressed at all levels of Miami's political order incited violence towards Mariel Cubans. *See id.*

41. *See id.* at 75 (describing the cultural differences between the Cuban-American community and the Mariel Cubans and how these differences acted as barriers between the two groups). *See generally* Williams, *supra* note 39, at 29 (reporting that residents of Miami were afraid that the Mariel Cubans would compete for scarce jobs). Also, it was reported that Dade County school officials and Florida state welfare officials expressed concerns regarding the lack of resources available to cope with newly arrived Mariel Cubans. *See id.*

42. *See* HAMM, *supra* note 20, at 75.

43. *See id.*

44. *See id.*

45. *See id.* (quoting Social Psychologist, Marvin Dunn who stated that "[w]ithin the racial context of this country their blackness carries a double burden: they [the black Mariel Cubans] not only get it from whites who discriminate against them but also from the Cubans who don't want to be identified with them").

46. *See id.* at 104, 108-14.

47. *See id.* at 76-77 (describing how criminal justice experts made blanket generalizations inferring that the religious practices of Mariel Cubans encouraged acts of violence and anti-social behaviors).

C. *The Excluded Mariels*[48]

INS resettlement figures later demonstrated that the statements which characterized the Mariel Cubans as mostly criminals and societal outcasts were false. Of the approximately 120,000 Mariel Cuban immigrants processed by INS in 1980, over 119,000 of them were paroled and sent to families or relief groups.[49] Approximately 100,000 of the Mariel Cubans were later granted permanent residency.[50] INS classified approximately 2000 of the Mariel Cubans as potentially excludable.[51] Many of those detained were eligible for parole, but could not find suitable sponsorship.[52] Consequently, they were sent to various federal facilities across the country to await further evaluation.[53]

The remaining 350, less than half of one percent of the total number of Cubans admitted to the United States in 1980 were found to have serious criminal backgrounds, and were sent to the U.S. Penitentiary in Talladega, Alabama.[54] These men were told that their release would be based on their "behavior in prison over the course of the next several months".[55] Of these 350 men, no evidence was offered by INS, which suggested that any of them had committed violent acts.[56] Later they were transferred to the U.S. Penitentiary in Atlanta, Georgia an old decaying facility previously slated to be torn down.[57] However, once the Mariel

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48. The words "excluded" and "excludable" refer to immigrants deemed inadmissible by the federal government in spite of their physical presence within the country. *See* discussion *infra* Part III. A and accompanying notes. These immigrants are legally considered to be outside of the country awaiting permission to enter. *See id.* An immigrant can be excluded for a variety of reasons: communicable diseases, criminal activity, public interest, lack of wealth, protection of the American work force, illegally entering the country and other miscellaneous reasons. *See* Immigration and Nationality Act of 1952 § 212(a), 8 U.S.C.A. § 1182(a) (West 1999).

49. *See* HAMM, *supra* note 20, at 58.

50. *See* LEGOMSKY, *supra* note 21, at 61.

51. *See* Palma v. Verdeyen, 676 F.2d 100, 101 (4th Cir. 1982). *See generally* Rodriguez-Fernandez v. Wilkinson, 654 F.2d 1382, 1384 (10th Cir. 1981).

52. *See* The Coalition to Support the Cuban Detainees, *How Long is Temporary Detention?: The Status of the Mariel Cuban Detainees* (visited Jan. 28, 1999) <http://www.cscd.org/website.hfm> (stating that detained Mariel Cubans have the burden of finding their own sponsor). In addition, the detained alien lacks the support and resources to find sponsorship. *See id.* at 2.

53. *See* HAMM, *supra* note 20, at 58.

54. *See id.*

55. *Id.* at 60.

56. *See id.* Further investigation by the author revealed that of these 350 individuals only 13 of them demonstrated a history of violent crime. One of them allegedly killed a fellow prisoner in Cuba. *See id.* The majority of the 350 individuals had committed misdemeanors or political crimes. *See id.* For example, one of these men spent seven years in a Cuban prison for stealing cheese. *See id.* at 60-61.

57. *See id.* at 84.

Cubans arrived in Atlanta, the facility was kept open to detain them.[58] These men were forced to live seven men to a cramped cell with four bunk beds, one sink and one toilet.[59]

After six years of detention, in February 1986, an oversight inspection of the Atlanta penitentiary conducted by the U.S. House of Representatives found that none of the Cubans being detained were serving a criminal sentence.[60] In fact, the Representatives found that the Cuban detainees were being indefinitely detained in this maximum-security prison for reasons other than a propensity for violence.[61] This finding was supported by the fact that in 1986, the medium-security federal correctional facility in Oakdale, Louisiana was opened to house the overflow of the nonviolent Cubans from the Atlanta facility.[62]

The continued detention of the excluded Mariel Cubans created a significant problem for the United States government. Most excludable aliens[63] are detained and immediately deported to their homelands.[64] Because the United States did not maintain formal diplomatic relationships with the Cuban government, there was no agreement with Cuba

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58. *See* HAMM, *supra* note 20, at 84.

59. *See id.* at 88; LEGOMSKY, *supra* note 21, at 60-61 (reporting that the conditions of confinement were described to a congressional subcommittee as "brutal and inhumane" and "intolerable").

60. *See* HAMM, *supra* note 20, at 68.

61. *See id.* (finding that of the almost 1,869 Mariel Cubans detained in the Atlanta Federal Penitentiary in February of 1986, all were detained for nonviolent reasons). *See generally* Interview with D'Ann Johnson, *supra* note 2 (reporting that one of her clients was transferred from the Bastrop County Jail to the federal prison in Talladega, Louisiana where he is being held in 23-hour lockdown segregation in spite of the fact that he was convicted of a minor drug possession offense).

62. *See* HAMM, *supra* note 20, at 68.

63. An excludable alien is an immigrant who is deemed inadmissible and is not eligible to receive visas or be admitted into the United States. *See* Immigration and Nationality Act of 1952 § 212(a), 8 U.S.C.A. § 1182(a) (West 1999). Throughout the history of the United States, excludable aliens have been characterized in a negative way in order to justify the harsh treatment they have received from the United States government. *See generally* Kevin R. Johnson, *Race, The Immigration Laws, and Domestic Race Relations: A "Magic Mirror" Into The Heart of Darkness*, 73 IND. L.J. 1111 (1998) (presenting a thorough discussion of the numerous ways that excluded aliens have been negatively characterized). Moreover, the word "alien" denotes inhuman characteristics. *See* Kevin R. Johnson, *"Aliens" and the U.S. Immigration Law: The Social And Legal Construction of Nonpersons*, 28 U. MIAMI INTER-AM. L. REV. 263, 267 (1997) (noting that the word "alien" connotes "nonhuman invaders"). The issue of alienage has long been associated with people of color. *See generally* The Chinese Exclusion Case, 130 U.S. 581, 609 (1889) (upholding a law which expressly excluded aliens (Chinese immigrants) from the United States). In this case, the negative connotation of the word "alien" is used to justify anti-immigrant feelings and laws against the Chinese. *See id.* at 603-04, 610.

64. *See* Immigration and Nationality Act of 1952 § 237(a), 8 U.S.C.A. § 1227(a) (West 1999).

concerning the repatriation of excludable Cuban aliens.[65] Cuba refused to repatriate the excluded Mariel Cubans, and no other country stepped forward to accept these people.[66] Grossly complicating this situation was the fact that several thousand Mariel Cuban parolees committed crimes, which resulted in the revocation of their parole.[67]

On December 14, 1984, the United States and Cuba agreed that Cuba would receive 2746 of these Mariel Cubans at the rate of approximately 100 per month.[68] In exchange, the United States would accept approximately 20,000 Cubans, including 3000 political prisoners.[69] In the next six months, 201 excluded Mariel Cubans were returned to Cuba, with at least 73 of these Cubans being re-imprisoned upon their arrival.[70] Castro suspended the 1984 agreement when relations between the United States and Cuba soured due to President Reagan's increased broadcasts of Radio Marti.[71] Thousands of Mariel Cubans were left to languish in American federal penitentiaries for an indefinite period of time.[72]

In 1987, the United States and Cuba decided to reinstate the 1984 agreement.[73] The imprisoned Mariel Cubans, fearing deportation to Cuba and political imprisonment, protested this agreement.[74] These protests led to prison riots in which the detainees gained control over both facilities and held hostages for a period of nine days.[75] During negotiations with the Mariel Cubans, the Justice Department agreed to institute a program that would review the remaining detainees on the list of 2746, in order to determine which Mariel Cubans should be repatriated to

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65. *See* LEGOMSKY, *supra* note 21, at 58.

66. *See* Gisbert v. U.S. Attorney Gen., 988 F.2d 1437, 1439-40 (5th Cir. 1993; Alvarez-Mendez v. Stock, 941 F.2d 956, 958 (9th Cir. 1991); Rodriguez-Fernandez v. Wilkinson, 654 F.2d 1382, 1384 (10th Cir. 1981).

67. *See* Gisbert, 988 F.2d at 1440; *Cf.* Garcia-Mir v. Meese, 788 F.2d 1446, 1448 (11th Cir. 1986).

68. *See* Fernandez-Roque v. Smith, 600 F. Supp. 1500, 1501 & n.2 (N.D. Ga. 1985); *see also* Rodriguez v. Thornburgh, 831 F. Supp. 810, 811 (D. Kan. 1993); Perez v. Neubert, 611 F. Supp. 830, 832-33 (D. N.J. 1985); 52 Fed. Reg. 48, 799 (1987) (codified at 8 C.F.R. pt. 212).

69. *See Fernandez-Roque*, 600 F. Supp. at 1501 n.2; HAMM, *supra* note 20, at 71.

70. *See* HAMM, *supra* note 20, at 71-72. *See generally* LEGOMSKY, *supra* note 21, at 60.

71. *See* HAMM, *supra* note 20, at 72; LEGOMSKY, *supra* note 21, at 60.

72. *See* HAMM, *supra* note 20, at 72; LEGOMSKY, *supra* note 21, at 60-61.

73. *See* Buchanan v. United States, 915 F.2d 969, 969 (5th Cir. 1990); *Rodriguez*, 831 F. Supp. at 811; HAMM, *supra* note 20, at 3; LEGOMSKSY, *supra* note 21, at 61.

74. *See Buchanan*, 915 F.2d at 970; *Rodriguez*, 831 F. Supp., at 811; *see also* HAMM, *supra* note 20, at 3-29.

75. *See Buchanan*, 915 F.2d at 970. *See generally Rodriguez*, 831 F. Supp. at 811; LEGOMSKY, *supra* note 21, at 61.

Cuba, and to review the cases of the non-repatriated Mariel Cubans to determine if release on parole was warranted.[76]

D. *The Cuban Review Process: Is Something Really Better Than Nothing?*

As promised, the Justice Department enacted the Cuban Review Plan (CRP) on June 22, 1987.[77] The CRP is a special program that expands the consideration of immigration parole with regard to Mariel Cubans.[78] Under this plan, detained Mariel Cubans are granted yearly parole hearings by INS.[79] In this process, a lower level INS representative interviews the detained immigrant annually to determine his suitability for parole.[80] Afterwards, a report is forwarded to the Cuban Review Panel in Washington D.C.[81] The detainees who are no longer considered a public threat are released from federal custody and granted parole.[82] It is disturbing to note that the excluded Cubans denied parole under the CRP are not provided with the reasons for their denial.[83]

The CRP attempts to provide a procedure of parole status review for excluded Mariel Cubans indefinitely detained.[84] Furthermore, it satisfies the government's burden to provide some mechanism designed to

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76. *See* 52 Fed. Reg. 48, 884-85 (Dec. 28, 1998) (modified by 55 Fed. Reg. 51, 778 (Dec. 17, 1990)). This program established repatriation review panels, which were separate and distinct from parole boards. *See id.*; *see also* 8 C.F.R. §§ 212.12, 212.13 (1999). *See generally* LEGOMSKY, *supra* note 21, at 61.

77. *See* Gisbert v. U. S. Attorney Gen., 988 F.2d 1437, 1443-44 & n.11 (5th Cir. 1993); 8 C.F.R. §§ 212.12, 212.13; HAMM, *supra* note 20, at 100.

78. *See* Barrera-Echavarria v. Rison, 44 F.3d 1441, 1444 (9th Cir. 1995)[*Echavarria II*] (describing the CRP as "a set of regulations governing the standards and procedures used by the INS to evaluate parole possibilities for detained Mariel Cubans); Coalition to Support the Cuban Detainees, *supra* note 52. According to this report, the primary factor in determining that a Mariel Cuban should be paroled is whether the INS panel believes that the individual poses a threat to the safety of the public. *See id.*

79. *See* 8 C.F.R. § 212.12 (g)(2) (1999).

80. *See* Interview with D'Ann Johnson, *supra* note 2. In the county facility where I was employed, the hearings conducted by INS consisted of no more than a brief interview in the booking area of the facility.

81. *See id.*

82. *See* 8 C.F.R. § 212.12(d)(2) (West 1999).

83. *See In re* Mariel Cuban, 822 F. Supp. 192, 196 (M.D. Pa. 1993) (affirming that INS does not have to disclose any information to the detainee regarding decisions of the hearing because excluded immigrants have no constitutional rights in immigration proceedings); Interview with D'Ann Johnson, *supra* note 2 (reporting that her clients have never received information about why they were denied parole).

84. *See In re* Mariel Cuban, 822 F. Supp. at 197; Fragedela v. Thornburgh, 761 F. Supp. 1252, 1254, 1256 nn.6 (W.D. La. 1991).

demonstrate that this civil detention is not indefinite in nature.[85] Unfortunately, the CRP is considered a failure as a remedy for the indefinite detention faced by indefinitely detained Mariel Cubans. In parole review hearings, detainees have no right to counsel and as a consequence face great hardship in maneuvering through the process unguided.[86] Moreover, the detainees are denied the right to challenge the evidence used by the government to justify their continued detention.[87] In determining parole eligibility, the INS keeps the evidence utilized against the immigrant secret.[88] The excluded immigrant does not have the right to review the evidence that serves as the basis of the INS' decision to deny parole.[89]

When the Mariel Cuban is finally granted immigration parole, the equally formidable step of securing placement in a suitable sponsorship program is likely prevent his release.[90] Many detainees are eligible for parole, but they are not released because they cannot secure a government-approved sponsor.[91] Looking at the process as a whole, the burden

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85. In *Rodriguez-Fernandez* the court held that the government bears the burden to show that an "alien's" detention is still temporary pending exclusion, and not simply incarceration." *See* Rodriguez-Fernandez v. Wilkinson, 654 F.2d 1382, 1389-90 (10th Cir. 1981) (suggesting that indefinite detention of a Mariel Cuban did not fulfill the stated purpose of the INS; rather it was impermissible punishment). In this case, the court ordered release of the petitioner, a Mariel Cuban, because the government could not prove that the petitioner was being detained temporarily. *See id.* at 1390.

86. *See In re* Mariel Cuban, 822 F. Supp. at 196-97 (examining petitioner's complaint that the Cuban Review Plan fails to protect Fifth Amendment rights because detainees are not provided counsel at annual review hearings). The court rejected this argument and noted that excludable aliens are only entitled to due process as set forth by Congress. *See id.* at 197. *But see* Saldina v. Thornburgh, 775 F. Supp. 507, 508-09 (D. Conn. 1991) (affirming the court's previous order to appoint legal counsel to petitioners, Mariel Cubans, as required by the Criminal Justice Act (CJA)). The court determined that the petitioners were experiencing the "loss of liberty" as defined in CJA; therefore, they were entitled to counsel. *See id.* at 511.

87. *See In re* Mariel Cuban, 822 F. Supp. at 196 (justifying the denial of petitioners' Fifth Amendment right to call on witnesses, and cross-examine witnesses during their annual review).

88. *See No More Secret Evidence Series: Editorials*, ST. PETERSBURG TIMES, May 23, 1999, at 2D. (noting that The Secret Evidence Repeal Act of 1999 was introduced in the U.S. House of Representatives by House Minority Whip David Bonior and Rep. Tom Campbell to repeal the law that allows INS to keep secret evidence from immigrants).

89. *See In re* Mariel Cuban, 822 F. Supp. at 196; HAMM, *supra* note 20, at 97; Interview with D'Ann Johnson, *supra* note 2 (reporting that INS has refused to allow her to review any evidence such as prison behavioral records, medical records, and psychiatric evaluations considered by INS to determine parole eligibility of her indefinitely detained clients).

90. *See* 8 C.F.R. § 212.12 (f) (West 1999).

91. *See* The Coalition to Support Cuban Detainees, *supra* note 52. *See generally* 8 C.F.R. § 212.12(f) (providing the criteria of an appropriate sponsor).

of the alien seems impossible to overcome.[92] The failures of the CRP transform temporary detention pending parole or deportation into an indefinite civil detention.[93] In the worse case scenario, the detention imposed by INS is indefinite with an annual review.[94] At best, the excluded Mariel Cuban is held for a minimum of a year after completing his criminal sentence awaiting parole and placement.[95] The excluded Mariel Cuban does not know how long he will be imprisoned nor does he understand the process that justifies this imprisonment.[96]

E. *The Excluded Mariel Cubans of 2000*

The excluded Mariel Cubans that continue to be detained fall into one of two groups. The first group is made up of individuals who were denied entry at the time of their arrival because they were alleged to have committed crimes on Cuban soil or they were considered mentally incompetent before their emigration.[97] The second group of excluded Mariel Cubans consists of individuals who were initially paroled, but subsequently have had their parole revoked due to a violation.[98] Some violations of parole have been for non-criminal acts such as not having a sponsor, not having means of support, not having a fixed address, or not having their green card on their person while working.[99] However, many immigrants have violated their immigration parole by committing a

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92. *See* HAMM, *supra* note 20, at 97, 100-01; Coalition to Support the Cuban Detainees, *supra* note 52.

93. *See* Coalition to Support the Cuban Detainees, *supra* note 52 (noting that although approximately 1,000 to 1,400 Mariel Cubans are allegedly "temporarily" detained, in reality they have been detained for years).

94. *See generally* Interview with D'Ann Johnson, *supra* note 2 (reporting that one Mariel Cuban remains detained in the Talladega Federal Prison after 18 years).

95. *See id.*

96. *See* Coalition to Support the Cuban Detainees, *supra* note 52 (stating that although the statute seems to suggest that the Justice Department is responsible for assisting Mariel Cubans with services related to the CRP, in reality they are left on their own); Interview with D'Ann Johnson, *supra* note 2 (reporting that her clients are often misinformed by INS officials about the CRP process).

97. *See* Garcia-Mir v. Meese, 788 F.2d 1446, 1448 (11th Cir. 1986). *See generally* HAMM, *supra* note 20, at 51 (reporting that Castro informed the Reagan Administration that the mentally ill persons, which he allowed to leave from Cuba, were in fact sent at the requests of their families already in the United States); LEGOMSKY, *supra* note 21, at 58.

98. *See* Gisbert v. U. S. Attorney Gen., 988 F.2d 1437, 1439-40 (5th Cir. 1993); *Garcia-Mir*, 788 F.2d at 1448.

99. *See* HAMM, *supra* note 20, at 66; Interview with D'Ann Johnson, supra note 2 (revealing that one of her clients who was on probation for a minor drug charge was detained by INS because he did not have his green card with him while working on a construction site). INS has detained this particular client for over two years. *See id.*

crime.[100] After these individuals complete their prison terms, they are placed in INS custody. Sadly, it is estimated that INS currently detains 1750 Mariel Cubans and 787 other Cubans in correctional facilities and detention centers across the country for an indefinite period of time.[101]

F. *The Continued Use of Indefinite Detention*

The indefinite civil detention imposed on excluded Mariel Cubans is now being endured by thousands of immigrants within the United States.[102] Indefinite detention has become a form of exclusion in regards to immigrants who have been ordered deported but cannot be returned to their homelands.[103] The number of immigrants imprisoned under such circumstances has increased dramatically due to the exponential growth of the number of immigrants that are denied continued residence and ordered deported.[104] Several provisions of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA)[105] are driving this increase.[106]

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100. *See generally Gisbert*, 988 F.2d at 1440 (explaining that numerous Mariel Cubans had their immigration parole revoked because they committed state and federal offenses ranging from petty theft to attempted murder).

101. *See* Interview with D'Ann Johnson, *supra* note 2 (noting that Catholic Charities reports that there are approximately 1,750 Mariel Cubans, and 787 other detained Cubans). The "other Cubans" are Cubans that did not come to the United States during the Mariel Boatlift. *See id.* Ms. Johnson, through a freedom of information request, was informed that there are 88 detained Cubans in the San Antonio District including Bastrop County Jail, Bastrop Federal Prison, Victoria County Jail and Three Rivers Federal Prison. *See id.* Determining the exact number of indefinitely detained immigrants is difficult. Another report indicates that there are between 1,000 and 1,400 Mariel Cubans currently detained. *See* the Coalition to Support the Cuban Detainees, *supra* note 52. Finally, the Human Rights Watch Organization issued a report that indicated that there were a total of 1,800 undeportable INS detainees as of May 1998 according to Kristine Marcy, a senior counsel in the INS office of Field Operations, Detention and Deportation in Washington D.C. *See* Human Rights Watch Report, *supra* note 7.

102. *See* Interview with D'Ann Johnson, *supra* note 2.

103. *See* Coalition to Support the Cuban Detainees, *supra* note 52.

104. *See* Michelle Mittelstadt, *INS Removes 70 Percent More Criminal and Illegal Aliens*, ASSOCIATED PRESS, Feb. 19, 1998 (finding that in the latter part of 1997, INS detained and deported 34, 134 criminal and illegal immigrants, a seventy percent increase over the same period just a year before). INS planned to remove 127,300 people in 1998. *See id.* However, INS actually detained and deported 171,154 illegal aliens in 1998, a new record. *See* Ruth Singleton, *ABA Tackles New Immigration Act*, NAT'L L.J., Jan. 25, 1999, at B7. This number indicates that there has been over a fifty percent increase in the number of aliens deported from 1997. *See id.*

105. *See* Pub. L. No. 104-208, 110 Stat. 3009, 3009-546 (1996) (codified as amended in scattered sections of 8, 18 U.S.C.).

106. *See* Peter H. Schuck, *Border Crossing*, THE AMERICAN LAWYER, Jan.-Feb. 1999, at 78 (noting that provisions of IIRIRA exclude undocumented workers and provide tough sanctions against immigrants who commit crimes).

Primarily, IIRIRA broadened the grounds for classifying an immigrant as an excludable alien. The government has always been able to exclude an immigrant for a variety of reasons including: communicable diseases, criminal activity, public interest, lack of wealth, protection of the American work force and other miscellaneous reasons.[107] IIRIRA expanded the types of crimes committed by immigrants that would classify an alien as excludable.[108] In addition, aliens who had once been considered "entered," although their entry had been accomplished by illegal means, must now be classified as excludable aliens and removed.[109] Finally, IIRIRA requires that excluded immigrants be detained until they have had their exclusion or deportation proceeding or until deported.[110] The punitive nature of IIRIRA represents a significant change in American policy towards immigrants.[111] This new law limits the discretion previously available to INS and the courts to determine if detention is warranted in each case,[112] effectively destroying the tenuous balance that the federal government had established between enforcing the law and preserving immigrants' rights.[113]

G. *Conditions of Indefinite Detention*

Again overwhelmed by the immediate demand for detention space, the INS has chosen to house 60 percent of its 15,000 detainees in local county

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107. *See* LEGOMSKY, *supra* note 21, at 290.

108. *See id.*

109. *See* Immigration and Nationality Act of 1952 § 237(a)(1)(A), 8 U.S.C. § 1227(a)(1) (West 1999); LEGOMSKY, *supra* note 21, at 290; Schuck, *supra* note 106, at 78 (reporting that IIRIRA created a process to exclude immigrants that enter the country illegally without proper documentation or with fraudulent documentation).

110. *See* Michelle L. Saenz-Rodriguez, *Detention in the Name of Justice*, TEXAS LAWYER, Jan. 18, 1999, at 33.

111. Since the passage of the Cuban Adjustment Act of 1966, Cubans had either been admitted or paroled, leading to the eventual grant of permanent residency. *See* LEGOMSKY, *supra* note 21, at 62. However, a dramatic shift in American policy towards Cuban refugees occurred in 1994 after thousands of Cubans fled Cuba, attempting to reach the United States. *See id.* at 61-62. Though several thousand Cubans attempted the journey, many drowned at sea. *See* Cuban American Bar Ass'n, Inc. v. Christopher, 43 F.3d 1412, 1417-18 (11th Cir. 1995). Fearing a repeat of the Mariel Boatlift of 1980, President Clinton responded to this mass immigration of Cubans by closing the borders to Cubans, detaining them offshore at Guantanamo Bay, Cuba. *See id.*; LEGOMSKY, *supra* note 21, at 62; Daniel Williams, *Appeals Court Overturns Order Blocking Return of Refugees to Cuba*, WASH. POST, Nov. 5, 1994, at A16.

112. *See* Schuck, *supra* note 106, at 78 (noting that INS and court discretion is negated by passage of statutes including IIRIRA).

113. *See id.*

jails.[114] These county facilities are extremely inadequate sites for long-term detention because they are built for state prisoners serving extremely short sentences or charged individuals awaiting trial for a short period of time.[115] As a result, indefinitely detained immigrants housed in such facilities are not provided with adequate health care,[116] are denied access to direct sunlight,[117] and physical contact with visitors.[118] In addition to being subjected to poor living conditions, the detainees are transferred frequently to other facilities, and remain in these county facilities for a disturbingly long period of time.[119]

Excluded immigrants detained by INS "awaiting deportation" are held in federal and state correctional facilities across the country, including maximum-security facilities, regardless of their violent tendencies.[120] INS

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114. *See* Human Rights Watch, *supra* note 7. *See generally* Russell Gold, *Holding Pattern*, SAN ANTONIO EXPRESS-NEWS, Feb. 14, 1999, at 1A.

115. *See* Interview with D'Ann Johnson, *supra* note 2.

116. *See* Human Rights Watch, *supra* note 7 (detailing inadequacy of medical care); Interview with D'Ann Johnson, *supra* note 2 (revealing that the county facilities where her clients are held do not have medical staff present). INS officials in the San Antonio District office have told her that physician services are only administered if it is a life-threatening situation. *See id.* Ms. Johnson revealed that one client who had a bulging hernia was denied medical treatment because INS did not consider his condition an emergency. *See id.*

117. *See* Interview with D'Ann Johnson, *supra* note 2 (stating that none of her clients at the Bastrop County Jail are allowed to go outside). As a result several of them have developed skin lesions that have not been medically treated. *See id.*

118. *See* Human Rights Watch, *supra* note 7 (noting that detainees are physically separated from visitors at all times in visiting facilities with no privacy).

119. *See id.* (reporting that some detainees may be transferred as many as eight times within a single year which effectively severs all ties with family and legal representatives); Interview with D'Ann Johnson, *supra* note 2 (explaining that she has one client who has been detained, by the INS, in county jails for over six years and, during that time, he has been in eight different county facilities).

120. *See, e.g., Echavarria I*, 21 F.3d 314, 316 (9th Cir. 1994) *rev'd*, 44 F.3d. 1441 (9th Cir. 1995) (acknowledging that a Mariel Cuban detainee had been held in maximum security federal correctional facilities located in Atlanta, Leavenworth, and Lompoc and at Bastrop, a medium security facility); Human Rights Watch, *supra* note 7 (listing 35 county jails where INS detainees have been held). Interview with D'Ann Johnson, *supra* note 2 (reporting that in the San Antonio INS district, Cuban detainees are held in the Bastrop County Jail, the Bastrop Federal Penitentiary, the Victoria County Jail, and the Three Rivers Federal Prison). In addition, two of Ms. Johnson's Mariel Cuban clients who had not been convicted of violent crimes, were transferred from the Bastrop County Jail to the Talladega federal facility where they are being held in 23-hour lock-down. *See id.* According to Ms. Johnson, this facility has had an internal policy since the riots in 1987, to keep all Cubans in segregation 23 hours a day with one hour of recreation time where the client is kept in shackles. *See id.* Additionally, a client reported to Ms. Johnson that in the past month the food he has received has been rotten and he does not receive any medical attention for severe migraine headaches). *See id.*

detainees are treated as prisoners in every way.[121] These detained immigrants are subject to the same deprivations experienced by those individuals who are imprisoned as a form of punishment for committing crimes.[122] In fact, sometimes the conditions imposed on Cuban detainees are worse than what the average convicted felon faces.[123]

III. THE LEGAL BASIS FOR INDEFINITE DETENTION

A. *The Importance of Words*

Immigrants are considered "persons" under the Constitution.[124] However, they have been granted significantly fewer protections than citizens.[125] Immigrants with the least amount of constitutional rights have been divided into two groups: deportable aliens and excludable aliens.[126] "Deportable aliens" are immigrants who have entered the country, but will no longer be allowed to remain within the United States.[127] In con-

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121. *See generally* Rodriguez-Fernandez v. Wilkinson, 654 F.2d 1382, 1385 (10th Cir. 1981) (noting that Petitioner, one of 1,700 detained Mariel Cubans similarly situated, is subject to the same conditions as American criminals).

122. *See Echavarria I*, 21 F.3d at 316 (noting that Barrera-Eschavarria, a Mariel Cuban detained by the INS was held in federal penitentiaries where he was subjected to the severest conditions, equal to those who are imprisoned for criminal offenses); Human Rights Watch, *supra* note 7 (detailing in graphic terms the conditions that these people are subjected to in correctional facilities); Interview with D'Ann Johnson, *supra* note 2 (stating that her clients in the Bastrop County Jail, Victoria County Jail, and Bastrop federal prison and the 33 un-represented detainees in the Three Rivers federal prison are all treated equal to prisoners). The conditions of the detention inflicted on her clients are identical to those of people imprisoned for criminal offenses. *See id.* They are subjected to the dangers of the environment including overcrowding, assault from dangerous felons, isolation, inadequate nutrition, poor medical care, and for some continuous solitary confinement. *See* Human Rights Watch, *supra* note 7.

123. *See* Interview with D'Ann Johnson, *supra* note 2 (reporting that in some federal prisons, Cubans are automatically placed in 23-hour segregation because they are Cuban). Specifically, Ms. Johnson reports that two of her clients denied parole for nonviolent minor criminal offenses were transferred to Talladega, a federal facility and placed in segregation cells. *See id.*

124. *See* Yick Wo v. Hopkins, 118 U.S. 356, 369 (1896); Wong Wing v. United States, 163 U.S. 228, 238 (1896).

125. *See* Harisiades v. Shaughnessy, 342 U.S. 580, 586 (1952) (reaffirming that although in many areas the alien has equal legal footing with the citizen, in other areas the alien has not been given legal parity with the citizen). For example, this Court notes that aliens cannot run for public office. *See id.* at 586 n.10. Also, an alien's right to travel outside the United States is subject to restrictions not applicable to a U.S. citizen. *See id.*

126. *See* Landon v. Plasencia, 459 U.S. 21, 24-26 (1982); Gisbert v. U.S. Attorney Gen., 988 F.2d 1437, 1440 (5th Cir. 1993).

127. *See* Immigration and Nationality Act of 1952 § 237, 8 U.S.C.A. § 1227 (West 1999); *see also Landon*, 459 U.S. at 25; The Japanese Immigrant Case, 189 U.S. 86, 101 (1903).

trast, "excludable aliens" are immigrants who are considered to be outside the border of the United States, awaiting permission to enter the country.[128] An excluded alien can be physically present within the United States, yet still be considered outside the country.[129] This doctrine known as the "entry fiction" was created to allow the federal government to essentially estop the legal rights of newly arrived immigrants until a determination of their suitability for admission to the United States could be made.[130] Once an excluded alien is denied entry, he is detained in federal custody until he can be returned to his country.[131]

Courts throughout the development of immigration policy in American Jurisprudence have recognized a sharp distinction between the legal status of excludable aliens and deportable aliens.[132] Federal immigration statutes acknowledged a similar distinction between immigrants who were denied entry the country (excludable aliens) and immigrants who had already entered the country but would no longer be allowed to remain (deportable aliens).[133] With the enactment of IIRIRA, this statutory terminology was abolished.[134] The proceeding for deportation or exclusion is now called a removal proceeding,[135] although legal distinctions between excludable aliens and deportable aliens in the case law remain.[136]

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128. *See* Gisbert v. U.S. Attorney Gen., 988 F.2d 1437, 1440 (5th Cir.); *Landon*, 459 U.S. at 25; LEGOMSKY, *supra* note 21, at 43.

129. *See Echavarria II*, 44 F.3d at 1443; *Gisbert*, 988 F.2d at 1440; *see also* Garcia-Mir v. Smith, 766 F.2d 1478, 1483-84 (11th Cir. 1985); Jean v. Nelson, 727 F.2d 957, 969 (11th Cir. 1984).

130. *See* Leng May Ma v. Barber, 357 U.S. 185, 188 (1958); Shaughnessy v. Mezei, 345 U.S. 206, 215 (1953); Rodriguez-Fernandez v. Wilkinson, 654 F.2d 1382, 1387 (10th Cir. 1981).

131. *See* Immigration and Nationality Act of 1952 § 235 (b) (2), 8 U.S.C.A. § 1225 (b) (2) (Supp. 1989). *See generally Landon*, 459 U.S. at 24-25; *Shaughnessy v. Mezei*, 345 U.S. at 215; *Gisbert*, 988 F.2d at 1440.

132. *See, e.g., Landon*, 459 U.S. at 25-26 (explaining the differences between exclusion and deportation proceedings); *Gisbert*, 988 F.2d at 1440 (recognizing the differences between exclusion and deportation proceedings); *Rodriguez-Fernandez*, 654 F.2d at 1386 (stating exclusion proceedings grant less due process rights than deportation hearings).

133. *See* Immigration and Nationality Act of 1952 § 212(a)(1)(A)(iii), 8 U.S.C.A. § 1182(a)(1)(A)(i), (iii) (West 1999); Immigration and Nationality Act of 1952 § 237(a), 8 U.S.C.A. § 1227(a) (West 1999); LEGOMSKY, *supra* note 21, at 24.

134. *See* LEGOMSKY, *supra* note 21, at 24.

135. *See id.*

136. *See, e.g.*, Leng May Ma v. Barber, 357 U.S. 185, 187 (1958) (stating that aliens that entered the country have more rights than those seeking entry; Shaughnessy v. Mezei, 345 U.S. 206, 212 (1953) (recognizing that once an alien has entered the country, legally or illegally, any proceeding to remove him must conform with "traditional standards of fairness encompassed in due process of law"); *Echavarria II*, 44 F.3d at 1448 (stating that the court has made distinctions between excludable and deportable aliens). *See generally Lan-*

B. *Excluded From the Constitution*

The United States Supreme Court has determined that deportable aliens considered within the borders of the country have certain constitutional rights that are not bestowed on excludable aliens considered "on the threshold of initial entry".[137] Therefore, unlike deportable aliens, excludable aliens are not afforded constitutional due process protections in immigration proceedings.[138] The Supreme Court has held that excludable aliens are only entitled to due process protections statutorily created by Congress.[139] In *United States ex rel. Knauff v. Shaughnessy*,[140] the Court proclaimed that "[W]hatever the procedure authorized by Congress is, it is due process as far as an alien denied entry is concerned."[141] These unreasonable words continue to be heard in courtrooms across the country invoking feelings of hopelessness and despair in those that are indefinitely detained and await relief from a Congress unwilling to provide a remedy.

Constitutional due process protection hinges on the distinction between exclusion and deportation for several reasons. Early in its immigration decisions, the Supreme Court held that excludable aliens could not receive due process protection from the Constitution because the Constitution was not applicable to those individuals beyond the borders of the country awaiting permission to enter.[142] In addition, it was thought that deportation removed an interest that has lawfully been acquired, therefore the interest of the deportable alien would be considered more substantial than the excluded alien, thus requiring more legal protec-

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don, 459 U.S. at 25-26 (explaining the administrative differences between exclusion and deportation proceedings). Because of this distinction, it will be clearer to the reader if I continue to use the terms "excludable" and "deportable" when discussing each group and how the courts have interpreted what constitutional safeguards apply. Also, it will be easier to use the words exclusion or deportation, as the courts have used them, to differentiate between denying an alien entry and expelling an alien who has already entered the country.

137. *See Leng May Ma*, 357 U.S. at 187 (explaining that excluded aliens have less rights than deported aliens); *see also* Gisbert, 988 F.2d at 1440 (proclaiming that deportable aliens have more substantive rights than excluded aliens).

138. *See Landon*, 459 U.S. at 26-27.

139. *See* Shaughnessy v. Mezei, 345 U.S. 206, 212 (1953) (finding that due process for aliens denied entry is determined by Congress).

140. Knauff v. Shaughnessy, 338 U.S. 537 (1950).

141. *Id.* at 544.

142. *See* LEGOMSKY, *supra* note 21, at 43 (stating that although Justice Brewer stated in *Fong Yue Ting v. United States* that the Constitution did not apply to those outside of the United States Territory, this notion is not entirely true today). The Supreme Court, through its holdings in several cases, has designated certain constitutional provisions to apply to United States citizens residing abroad and to certain individuals who are nonresident aliens. *See id.*

tion.[143] These assertions seem specious when faced with the reality that there are Mariel Cubans that have been incarcerated for over fifteen years in federal prisons without having been convicted of a crime that would justify such prolonged detention.[144]

Although excludable aliens are not granted constitutional due process rights in civil immigration proceedings, as "persons" they are granted these rights in criminal proceedings.[145] In *Jean v. Nelson*,[146] Justice Marshall eloquently expressed his concern regarding the legal opinions that have denied Fifth Amendment due process rights to detained excluded immigrants when he stated "[s]urely it would defy logic to say that a precondition for the applicability of the Constitution is an allegation that an alien committed a crime."[147] Despite Justice Marshall's outrage, excluded immigrants continue to be denied due process.[148] This interpretation of the law allows the federal government to impose indefinite detention on almost 1400 Mariel Cubans today.[149]

C. *The Power to Exclude*

The Constitution does not expressly grant the federal government power to regulate immigration.[150] However, the federal government's authority to control immigration has been derived from various enumer-

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143. *See* Fong Yue Ting v. United States, 149 U.S. 698, 762 (1893) (Fuller, C.J., dissenting) (declaring that the right to be within the United States is a valuable right which cannot be taken away by the enactment of legislation).

144. *See Echavarria I*, 21 F.3d at 314 (demonstrating that although petitioner's criminal record is not spotless, much of his incarceration was not the result of a criminal conviction); Interview with D'Ann Johnson, *supra* note 2 (explaining that she has received information that there is a Mariel Cuban in the Talladega Federal Prison that has been imprisoned for 18 years.) He is currently being held in a 23-hour lock-down segregation cell. *See id.*

145. *See* Wong Wing v. United States, 163 U.S. 228, 238 (1896) (noting that "all persons" including aliens, subject to criminal proceedings are entitled to the Fifth and Sixth Amendments' constitutional protections).

146. Jean v. Nelson, 472 U.S. 846 (1985).

147. Id. at 874 (Marshall, J., dissenting). Finally, Justice Marshall notes that it is absurd to promulgate that the Constitution protects immigrants from the "deprivation" of "property" but not deprivations of "life" or "liberty."

148. *See Echavarria II*, 44 F.3d at 1447 (noting that Congress has been aware of the effect of the law on Mariel Cubans for at least four decades); Gisbert v. U.S. Attorney. Gen., 988 F.2d 1437, 1448 (5th Cir. 1993) (holding that the indefinite detention of the petitioners, the Mariel Cubans, is constitutional). Here, the Court applies the "entry fiction" to justify the continued indefinite detention of Mariel Cubans today. *See id.* at 1442.

149. *See* Coalition to Support Cuban Detainees, *supra* note 52.

150. *See* LEGOMSKY, *supra* note 21, at 8 (emphasizing that nowhere in the Constitution is the federal government imbued with the express authority to regulate immigration).

ated[151] and un-enumerated powers.[152] Regardless of its source, Congress has manifested its authority to regulate immigration in Title Eight of the United States Code.[153] The executive branch of the federal government has been given the power to enforce these laws.[154] The Immigration and Naturalization Act of 1952 gave authority over immigration matters to the executive branch under the supervision of the Attorney General.[155] The Attorney General is given the duty to administer and enforce all laws related to immigration and naturalization.[156]

In 1889, the United States Supreme Court first recognized the federal government's power to exclude aliens in the significant immigration case known as *The Chinese Exclusion Case*.[157] The Supreme Court's decision came at a time when the United States was experiencing a recession, public hostility towards Chinese laborers within California was high, and the legislation at issue was deemed to be a means of protecting American citizens' employment.[158] The Court held that Congress has the power to exclude aliens from, or prevent their return to, the United States for any reason it deemed sufficient, even in times of peace.[159] The statute at issue was found to be constitutional, allowing Chinese immigrants to be denied entry into the United States.[160]

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151. *See generally* The Head Money Cases, 112 U.S. 580, 594 (1884) (determining that taxation was an appropriate exercise of Congressional power arising from Congress' enumerated power to regulate commerce with foreign countries as proscribed in the United States Constitution under article I, § 8, cl. 3). The Court did not hold that the movement of persons was commerce; rather that their movement was an activity that can be regulated by Congress even if their effect on interstate commerce was indirect. *See generally* Wickard v. Filburn, 317 U.S. 111, 124 (1942).

152. *See* The Chinese Exclusion Case, 130 U.S. 581, 603-04 (1889) (finding that the power to exclude aliens, although not enumerated, is one of the inherent powers of a sovereign nation).

153. *See generally* Immigration and Nationality Act of 1952 § 215, 8 U.S.C.A. § 1185 (West 1999).

154. *See* Jean v. Nelson, 472 U.S. 846, 874 (1985); Fong Yue Ting v. United States, 149 U.S. 698, 713-14 (1893); Nishimura Ekiu v. United States, 142 U.S. 651, 659-60 (1892).

155. *See generally* Immigration and Nationality Act of 1952 § 103(a)(1), 8 U.S.C.A. § 1103(a)(1) (West 1999) (granting authority to the Attorney General over the administration and enforcement of immigration laws except insofar as such powers relate to the powers and duties of the President).

156. *See id.* (providing that a determination and ruling by the Attorney General with respect to immigration laws is controlling).

157. *See The Chinese Exclusion Case*, 130 U.S. at 609 (declaring that the power to exclude foreigners is incident to powers of sovereignty belonging to the government, and "cannot be granted away or restrained"); *see also Fong Yue Ting*, 149 U.S. at 713-14 (emphasizing 'Congress' power to expel and exclude aliens).

158. *See The Chinese Exclusion Case*, 130 U.S. at 594-96.

159. *See id.* at 603-04.

160. *See id.* at 599-600.

In the *Chinese Exclusion Case*, the Supreme Court made additional determinations that established key principles in the interpretation of immigration cases. The Court held that although the Constitution does not expressly grant Congress the power to exclude aliens, the implied authority to do so is a matter of foreign affairs.[161] The power to control foreign affairs is itself inherent in the sovereign powers belonging to the federal government of the United States and delegated to Congress by the Constitution.[162] The Court found that any attempt to diminish this power would impose restrictions on the State's ability to govern and would be in violation of the separation of powers doctrine.[163]

Subsequent decisions by the Supreme Court have also affirmed the federal government's power to exclude.[164] In *United States ex rel. Knauff v. Shaughnessy*, the Supreme Court rejected the petitioner's assertion that particular immigration legislation was void as an unconstitutional delegation of power.[165] Here, the Court stated that "[t]he exclusion of aliens is a fundamental act of sovereignty. . ." [therefore] ". . .the decision to admit or to exclude an alien may be lawfully placed with the President, who may in turn delegate the carrying out of this function to the Attorney General."[166]

D. *The Plenary Power Doctrine*

Despite its role-defining decision in *Marbury v. Madison*,[167] the Supreme Court concluded that it did not have the power to determine the constitutionality of a federal immigration statute in The *Chinese Exclusion Case*.[168] The Court explained that it could not interpret the constitutionality of a federal statute that excluded Chinese immigrants because the regulation of immigration is an inherent sovereign power.[169] As such,

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161. *See id.* at 609 (reiterating that the power to exclude aliens is derived from the sovereignty power).

162. *See id.*; *see also* United States *ex rel.* Knauff v. Shaughnessy, 338 U.S. 537, 542 (1950) (reaffirming that exclusion of aliens is an inherent sovereign power).

163. *See The Chinese Exclusion Case*, 130 U.S. at 604.

164. *See* Shaughnessy v. United States *ex rel.* Mezei, 345 U.S. 206, 210 (1953); *United States ex rel. Knauff v.Shaugnessy*, 338 U.S. at 542-43; Wong Wing v. United States, 163 U.S. 228, 231 (1896).

165. *See United States ex rel. Knauff v. Shaughnessy* 338 U.S. at 544-47.

166. *Id.* at 542-43.

167. Marbury v. Madison, 5 U.S. 137, 178 (1803) (stating that it is the responsibility of the judicial branch to interpret the law and determine its compliance with the constitution).

168. *See* The Chinese Exclusion Case, 130 U.S. at 606 (stating that if the national government of the United States, "through its legislative department," determines that "foreigners of a different race" must be excluded-denied entry into the country-then such legislative decision is "conclusive upon the judiciary").

169. *See id.*

the Court determined that the power to exclude immigrants, is a decision under the exclusive control of the executive branch, comparing the decision to expel aliens to the executive branch's exclusive power to determine purely political issues.[170] The Supreme Court stated that issues involving inherent sovereign powers, such as political questions and exclusion decisions, remain outside the scope of judicial review due to the separation of powers doctrine established by the Constitution.[171]

Such reasoning promulgated by the Supreme Court is fatally flawed. If it were true that immigration decisions were above judicial review then the Supreme Court would not subject the immigration power to so many limitations.[172] The irrationality of concluding that immigration decisions are above judicial review is summed up best by Justice Marshall who stated that using this line of reasoning the Attorney General could arguably "invoke legitimate immigration goals to justify a decision to stop feeding all detained aliens."[173] It seems clear that the plain language of the Fifth Amendment cannot be overshadowed by the plenary power doctrine.[174] The Fifth Amendment states that a person shall not be "deprived of life, liberty or property without due process of law."[175]

Despite such flawed logic, the Supreme Court subsequently affirmed its position that Congress' power to regulate immigration is complete and absolute by stating that Congress has "plenary power to make rules for the admission of aliens and to exclude those who possess those character-

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170. *See id.* at 602-03; *see also* Hampton v. Mow Sun Wong, 426 U.S. 88, 101 n.21 (1976) (stating that the authority to regulate and establish immigration policy is vested in the political department, however the "judicial department. . . is required by the paramount law of the constitution to intervene"); Kleindienst v. Mandel, 408 U.S. 753, 766 (1972) (quoting Oceanic Navigation Co. v. Stranahan, 214 U.S. 320, 339 (1909) which states that "[O]ver no conceivable subject is the legislative power of Congress more complete than it is over the admission of aliens").

171. *See The Chinese Exclusion Case*, 130 U.S. at 602-03 (inferring that the exercise of certain sovereign powers by the executive and legislative branch should remain outside the scope of judicial review). *See generally Kleindienst*, 408 U.S. at 765 (affirming the notion that immigration decisions are determined by the government's political branches); Shaughnessy v. United States *ex rel.* Mezei, 345 U.S. 206, 212 (1953) (determining that decisions by the executive branch regarding alien exclusion are "final and conclusive").

172. *See generally* Wong Wing v. United States, 163 U.S. 228, 238 (1896) (declaring that the federal government can detain immigrants but cannot impose punishment without due process of the law); Nishimura Ekiu v. United States, 142 U.S. 651, 660 (1892) (noting that when an immigrant is denied entry and their liberty is restrained, he is entitled to file a writ of habeas corpus to determine the lawfulness of the restraint); United States v. Henry, 604 F.2d 908, 914 (5th Cir. 1979) (observing that early American case law established that immigrants within the United States have 4th , 5th and 14th Amendment rights).

173. Jean v. Nelson, 472 U.S. 846, 874 (1985) (Marshall, J., dissenting).

174. *See id.* (noting that it is contrary to the Fifth Amendment to deny immigrants protection from the deprivations of life, liberty or property).

175. U.S. CONST. amend. V.

istics that Congress has forbidden."[176] Furthermore, the Supreme Court has emphasized that there is no area of law where the legislative power of Congress is more complete than the regulation of immigration.[177] In the arena of immigration, the Court has stated that combined with the federal government's broad power to exclude or expel aliens, is the Court's limited scope of judicial inquiry into immigration legislation.[178] As a result, the plenary power doctrine[179] has consistently been applied to immigration decisions.[180] It is within the application of this legal doctrine, relatively free from judicial scrutiny, that the process resulting in the indefinite detention of excluded aliens operates to deny them of their liberty.

Since the adoption of the plenary power doctrine, the Supreme Court has attempted to explain why the power of the executive branch is absolute and unchecked in the area of exclusion.[181] First the Court has asserted that immigrants who seek admission into the United States do so without any constitutional rights.[182] Therefore any request for admission granted to an excluded alien is a privilege, not a right.[183] As a result, the

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176. *Kleindienst*, 408 U.S. at 766.

177. *See* Fiallo v. Bell, 430 U.S. 787, 792 (1977); *see also* The Chinese Exclusion Case, 130 U.S. 581, 602 (1889).

178. *See generally* Fong Yue Ting v. United States, 149 U.S. 698, 710-14 (1893) (discussing the distinct roles of the federal government and the judiciary in the area of immigration, as by the Constitution).

179. *See generally* Margaret H. Taylor, *Detained Aliens Challenging Conditions of Confinement and the Porous Border of the Plenary Power Doctrine*, 22 HASTINGS CONST. L.Q. 1087 (1995); Ann E. Pettit, Note, *"One Manner of Law": The Supreme Court, Stare Decisis and the Immigration Law Plenary Power Doctrine*, 24 FORDHAM URB. L.J. 165 (1996); Denise M. Fabiano, Note, *Immigration Law—Flores v. Meese: A Lost Opportunity to Reconsider the Plenary Power Doctrine in Immigration Decisions*, 14 W. NEW ENG. L. REV. 257 (1992).

180. *See Fiallo*, 430 U.S. at 792 (noting that judicial inquiry into immigration matters is limited because the legislative power of Congress is "largely immune from judicial control"); Shaughnessy v. United States *ex rel.* Mezei, 345 U.S. 206, 210 (1953); United States *ex rel.* Knauff v. Shaughnessy, 338 U.S. 537, 542-44 (1950); Nishimura Ekiu v. United States, 142 U.S. 651, 660 (1892); Gisbert v. U.S. Attorney. Gen., 988 F.2d 1437, 1440 (5th Cir. 1993); Garcia-Mir v. Meese, 788 F.2d 1446, 1450 (11th Cir. 1986); Palma v. Verdeyen, 676 F.2d 100, 103 (4th Cir. 1982).

181. *See Fong Yue Ting*, 149 U.S. at 707-08 (explaining that the right of a country to expel or deport immigrants is "absolute and unqualified" in order to protect itself); Richard F. Hahn, Note, *Constitutional Limits on the Power to Exclude Aliens*, 82 COLUM. L. REV. 957, 965-82 (1982) (discussing how the Supreme Court has justified its evaluation of the government's power to exclude throughout the last century).

182. *See Fong Yue Ting*, 149 U.S. at 711, 723 (discussing the notion that aliens have no rights in exclusion decisions). Here, the Court reaffirmed that aliens are subject to the authority of Congress in matters of exclusion or admission. *See id.* at 724.

183. *See United States ex rel. Knauff v. Shaughnessy*, 338 U.S. at 542 (stating that an excluded alien cannot assert a right of admission). *But see* Board of Regents of State Col-

government has been free to grant the requests of excludable aliens in any fashion it desires.[184] Second, the Court has concluded that the government's power in this area is an inseparable aspect of its sovereign powers, therefore beyond constitutional restraint.[185]

For example, the Supreme Court in *Shaughnessy v. United States ex rel. Mezei*[186] found that the government has the power to detain and permanently exclude an alien on national security grounds without an exclusion hearing.[187] In *Mezei*, the excluded alien had been a permanent resident but lost this status when he left the country for nineteen months, spending those months in Hungary.[188] Mezei was permanently excluded on the basis of confidential information, which the Attorney General refused to disclose to Mezei because he believed it would be prejudicial to the American interest.[189] This case which arose during the "Cold War",[190] reflects the Court's deference to Congress during this period.[191]

IV. LEGAL CHALLENGES TO THE INDEFINITE DETENTION OF MARIEL CUBANS

Although the United States Supreme Court has never ruled on the constitutionality of the indefinite detention of the Mariel Cubans, lower courts have addressed the issue.[192] Four Circuit Courts of Appeal have

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leges v. Roth, 408 U.S. 564, 571 (1972) (rejecting "the wooden distinction between rights and privileges that once seemed to govern the applicability of procedure due process rights"). In this case, the Court defined "liberty" more broadly to include privileges long acknowledged as necessary for people to pursue happiness. *See id.* at 572.

184. *See United States ex rel. Knauff v. Shaughnessy*, 338 U.S. at 541 (inferring that the federal government can exclude an alien for whatever reason it deems appropriate, without a hearing or any explanation); *Nishimura Ekiu*, 142 U.S. at 659 (noting that the government has the power to grant or exclude aliens in whatever manner desired).

185. *See* Fiallo v. Bell, 430 U.S. 787, 792 (1977); Shaughnessy v. United States *ex rel.* Mezei, 345 U.S. 206, 210-12 (1953); *United States ex rel. Knauff v. Shaughnessy*, 338 U.S. at 542-44; *Nishimura Ekiu*, 142 U.S. at 659-60); Gisbert v. U.S. Attorney Gen., 988 F.2d 1437, 1440 (5th Cir. 1993); Palma v. Verdeyen, 676 F.2d 100, 103 (4th Cir. 1982).

186. Shaughnessy v. United States *ex rel.* Mezei 345 U.S. 206 (1953).

187. *See id.* at 210-11.

188. *See id.* at 208.

189. *See id.*

190. *See* LEGOMSKY, *supra* note 21, at 58 (indicating that some cases, such as *Mezei*, a case involving the issue of indefinite detention of excluded aliens, arose during the Cold War).

191. *See Shaughnessy v. United States ex rel. Mezei*, 345 U.S. at 216 (commenting on what Congress' position on immigration was in light of the political climate of the day).

192. *See, e.g.*, Barrera-Echavarria v. Rison, 44 F.3d 1441 (9th Cir. 1995) [*Echavarria II*]; Gisbert v. U.S. Attorney Gen., 988 F.2d. 1437 (5th Cir. 1993); Garcia-Mir v. Meese, 788 F.2d 1446 (11th Cir. 1986) (holding that excluded Mariel Cubans do not have constitutionally based due process rights); Palma v. Verdeyen, 676 F.2d 100 (4th Cir. 1982) (holding that the Attorney General can statutorily detain Mariel Cubans); Rodriguez-Fernandez v.

held that the United States Attorney General has the implicit power to detain Mariel Cubans indefinitely.[193] In applying the established principles of the entry fiction doctrine[194] and the plenary power doctrine,[195] these Circuits have held that the indefinite detention of Mariel Cubans does not violate the Constitution.[196] Incredibly, the courts allow the executive branch to indefinitely detain immigrants because they are deemed to have no constitutional due process rights in immigration proceedings.[197]

The Eleventh Circuit Court of Appeals has been one of the most prolific in its decisions allowing the indefinite detention of excludable aliens.[198] In the early eighties, numerous writs of habeas corpus were filed within the Eleventh Circuit's jurisdiction because the majority of the detained Mariel Cubans were held at the federal penitentiary in At-

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Wilkinson, 654 F.2d 1382 (10th Cir. 1981) (holding that the Immigration and Nationality Act does not allow for indefinite detention to occur in place of deportation).

193. *See Echavarria II*, 44 F.3d at 1446-47 (finding that the Attorney General had implicit power to indefinitely detain Mariel Cubans). This power to detain extended to the petitioner who had been held for over a decade without having been convicted of a crime that would merit such a term of imprisonment. *See id.*; *Gisbert*, 988 F.2d. at 1446 (concluding that the Attorney General has implicit power to indefinitely detain Mariel Cubans until deportation); Fernandez-Roque v. Smith, 734 F.2d 576, 580 (11th Cir. 1984) (affirming the district court's finding that the government has implicit authority to detain Mariel Cubans indefinitely when immediate exclusion was not practical); *Palma*, 676 F.2d at 104 (finding that Attorney General had implicit power to indefinitely detain Mariel Cubans).

194. *See Echavarria II*, 44 F.3d at 1448-49; *Gisbert*, 988 F.2d. at 1440.

195. *See Echavarria II*, 44 F.3d at 1446-48 (stating that long-term detention of Mariel Cubans is implicitly allowed by Congress; therefore, the court gives deference to it); *Gisbert*, 988 F.2d at 1440 (noting that the government's power over plenary exclusion decisions is a fundamental attribute of sovereignty, and as such, exclusion decisions are largely immune from judicial review); *Palma*, 676 F.2d at 103 (declaring that "Congress has virtually plenary authority over the admission of aliens.").

196. *See Echavarria II*, 44 F.3d at 1449 (noting that excludable aliens have no constitutional due process rights in immigration proceedings that determine their admission or exclusion); *Gisbert*, 988 F.2d at 1442 (noting that excludable aliens are only entitled to due process rights created by law, not constitutional due process rights).

197. *See Echavarria II*, 44 F.3d at 1449; *Gisbert*, 988 F.2d at 1442-43 (declaring that the Supreme Court has held that excluded aliens are only entitled to due process rights created by statute); *Palma*, 676 F.2d at 103 (quoting the Supreme Court in *Knauff v. Shaughnessy*, which stated that "[w]hatever the procedure authorized by Congress is, it is due process as far as an alien denied entry is concerned"). Here, the Fourth Circuit notes that "Congress has virtually plenary authority over the admission of aliens". *Id.*

198. *See, e.g.*, Garcia-Mir v. Meese, 788 F.2d 1446, 1455 (11th Cir. 1986) (holding that "unless the appellees elect to seek, and the United States Supreme Court elects to grant, a petition for writ of *certiorari*, these cases have reached the terminal point and shall be dismissed); Garcia-Mir v. Meese, 781 F.2d 1450 (11th Cir. 1986) (rejecting petitioner's claim to a constitutionally based liberty interest and a violation of international law); Garcia-Mir v. Smith, 766 F.2d 1478, 1484-85 (11th Cir. 1985) (discussing the Attorney General's authority to indefinitely detain Mariel Cubans).

lanta.[199] District Judge Shoob of the Northern District of Georgia was repeatedly overturned for holding that indefinite detention was punishment and violated the Constitution.[200] The Eleventh Circuit Court admonished Judge Shoob for repeatedly failing to understand the "structure of immigration policy" in the United States.[201] The sentiments of the Eleventh Circuit were echoed in the words of Judge Vance, an Eleventh Circuit Judge, who said "the government can keep them [Mariel Cubans] in Atlanta until they die."[202]

Relief for excludable aliens seemed to be in sight when the Ninth Circuit Court of Appeals found that the indefinite detention of Barrera-Echavarria, a Mariel Cuban who had been imprisoned for over a decade, was unconstitutional.[203] Interestingly, in affirming the District Court's decision to grant Barrera's writ of habeas corpus, the Ninth Circuit in its opinion stated:

> "If we had to decide this case as one in which the validity of a statute was challenged as contrary to the Constitution of the United States, we would not hesitate to say that the Constitution has been violated. . .[W]e do not find in the ambiguous statutory scheme any authority to imprison Barrera indefinitely."[204]

Unfortunately, the anticipated relief was short lived, as the Ninth Circuit in rehearing the issue, reversed its prior decision and denied Barrera's grant of habeas corpus, finding instead that the Attorney General had authority to indefinitely detain Mariel Cubans.[205] In response to pe-

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199. *See* Fernandez-Roque v. Smith, 567 F. Supp. 1115, 1119 (N.D. Ga. 1983) (stating petitioners include "a significant number of Cubans who were previously paroled into the United States by the Attorney General. . .but who are now incarcerated in Atlanta following revocation of their parole.").

200. Judge Shoob determined that excluded Mariel Cubans had the right to know why they were being confined; a limited right to counsel; a "presumption of releaseability"; and a right to notice of factual allegations that supported their continued detention. *See id.* at 1143-45. Judge Shoob held that the INS had to prove their case of continued detention or release the detainees. *See id.* at 1145. The Eleventh Circuit reversed this decision finding that the immigration detention of excluded aliens "does not rise to the level of a constitutional infringement". *Fernandez-Roque*, 734 F.2d at 582. Again, the Eleventh Court in *Garcia-Mir v. Meese* held that the due process right to parole hearings did not apply to excludable aliens because they do not have "actionable nonconstitutionally based liberty interests" entitling them to parole revocation hearings. *See* Garcia-Mir v. Meese, 788 F.2d 1446, 1447 (11th Cir. 1986).

201. *See* Perez-Perez v. Hanberry, 781 F.2d 1477, 1479 n.2 (11th Cir. 1986).

202. HAMM, *supra* note 20, at 73.

203. *Echavarria I*, 21 F.3d 314, 319 (9th Cir. 1994), *rev'd*, 44 F.3d 1441 (1995) [*Echavarria I*] (declaring that "no person may be imprisoned for many years without prospect of termination").

204. *Id.* at 317.

205. *See Echavarria II*, 44 F.3d 1441, 1445 (9th Cir. 1995).

titioner's assertion that his imprisonment was a form of punishment and thus a violation of his right to due process, the Court concluded that an alien deemed excludable does not possess a due process right to remain free from incarceration pending deportation.[206] The Court found that although Congress does not explicitly authorize the Attorney General to indefinitely detain Mariel Cubans, such authority is implicitly derived from the interplay of several statutory provisions.[207] In addressing the issue of whether Barrera's continued detention violated international laws against arbitrary detention, the Court held that where federal statutes and international laws co-exist with regard to a specific area, federal statutes control.[208]

In oral argument before the Ninth Circuit, meeting *en banc*, the attorney for Barrera-Echavarria asserted that the imprisonment of Barrera-Echavarria was unconstitutional because it violated the due process clause inflicting an unlawful punishment rather than a form of "regulatory detention".[209] The Court challenged counsel's contention that the prison conditions were a form of punishment.[210] There were no facts in the record to support this contention and the court refused to take judicial notice of the prison conditions at the United States Penitentiary in Leavenworth, Kansas.[211] The Court found the indefinite detention of Barrera-Echavarria to be constitutional, relying on *Mezei*.[212] One wonders what the outcome of Barrera–Echavarria's case would have been if these assertions had been made at the trial level.

Two circuits have considered whether or not the indefinite detention of Mariel Cubans amounts to punishment. In *Gisbert v. Attorney Gen-*

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206. *See id.* at 1448.

207. In this case, the Court found that the Attorney General's authority to indefinitely detain excluded immigrants was derived implicitly from the following statutory provisions: 8 U.S.C.A. §§ 1225 (b), 1226, 1227 (a) (1), 1182 (d) (5) (A) (West 1999). *See id.* at 1445. *See generally* Palma v. Verdeyen, 676 F.2d 100, 104 (4th Cir. 1982).

208. *See Echavarria II*, 44 F.3d at 1451.

209. Yxta Maya Murray, *The Latino-American Crisis of Citizenship*, 31 U.C. DAVIS L. REV. 503, 540 (1998) (discussing arguments presented by Barrera-Echavarria's lawyers before the Ninth Circuit Court of Appeals).

210. One judge stated that there was no evidence presented that distinguished between the conditions experienced by Barrera-Echavarria, at Leavenworth and Lampoc federal prisons, and those experienced by guests at the Ritz-Carlton. *See id.* Another judge stated "How do we know that there is not a mini-Ritz Carlton inside of Leavenworth, where he romps with his friends and watches television and just has a gay time?" *Id.* at 541.

211. *See id.*

212. *See Echavarria II*, 44 F.3d at 1450; *see also* Shaughnessy v. United States *ex rel.* Mezei, 345 U.S. 206, 215 (1953) (finding that continued exclusion does not deprive an excluded alien of any constitutional rights).

eral,[213] the Fifth Circuit Court of Appeals determined that the indefinite detention of Mariel Cubans was not punishment.[214] However, the court made it clear that this determination was made without considering the conditions of detention endured by these Mariel Cubans.[215] The Court clarified that it was determining whether or not the detention itself was punishment.[216]. The Court did not address the indefinite nature of the detention or the conditions of the confinement experienced by the excludable aliens.[217]

In contrast, the Tenth Circuit found that the indefinite detention of excludable Mariel Cubans was punishment because the detention amounted to unlawful imprisonment.[218] In *Rodriguez-Fernandez v. Wilkinson*,[219] the court found that the Mariel Cuban is imprisoned under conditions as harsh as those experienced by America's worst criminals.[220] The Court noted that the term of the confinement "is prolonged; perhaps it is permanent."[221] The court concluded that the detention of the petitioner, a Mariel Cuban, was used as an alternative to exclusion, rather than as a part of the process which returns excludable Mariel Cubans to Cuba.[222]

The heart of the government's arguments before the Tenth Circuit Court was the holding of *Shaughnessy v. Mezei*.[223] In *Mezei*, the Supreme Court did not require the release of an excludable alien who was held at Ellis Island for twenty-one months while the Supreme Court heard his case.[224] The Tenth Circuit Court of Appeals distinguished the

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213. Gisbert v. U.S. Attorney Gen., 988 F.2d 1437 (5th Cir. 1993).

214. *See id.* at 1442.

215. Petitioners relied "only on the fact and duration of their continued detention . . .they do not complain about the conditions of that detention." *Id.* at 1441.

216. *See id.* at 1441.

217. The Court indicated that it was not addressing the conditions or the indefinite nature of the detention, only the fact of the detention. *See id.*

218. *See* Rodriguez–Fernandez v. Wilkinson, 654 F.2d 1382, 1387 (10th Cir. 1981). Here, the Tenth Circuit relied upon *Petition of Brooks*, which essentially stated that the arrest and detention of an alien is a necessary aspect of the "right to exclude or deport." Petition of Brooks, 5 F.2d 238, 239 (D. Mass. 1925). However, there is no right to indefinitely detain an alien. *See id.* An alien should either be deported or released. *See id.* The court noted in *United States ex rel. Ross v. Wallis* that unless the indefinitely detained immigrant is deported after all legal remedies have been exhausted, the continued detention is unlawful imprisonment. *See* United States *ex rel.* Ross v. Wallis, 279 F. 401, 403-04 (2d Cir. 1922).

219. Rodriguez-Fernandez v. Wilkinson, 654 F.2d 1382 (10th Cir. 1981).

220. *See* id. at 1385.

221. *Id.*

222. *See id.* at 1386.

223. *See id.* at 1388 (comparing the legal and factual issues of *Shaughnessy v. United States* ex rel. *Mezei*, 345 U.S. 206, 215 (1953) with these of the petitioner, Rodriguez-Fernandez).

224. *See id.*

Rodriguez-Fernandez case from the *Mezei* decision on two grounds.[225] First, the Court noted that Mezei was excluded for reasons of national security while the Korean War was being waged.[226] Second, the major issue in *Mezei* focused on the excluded alien's right to a due process hearing regarding his right to re-enter the United States.[227] The Court noted that Rodriguez-Fernandez's petition sought only release, while Mezei sought not only release, but also challenged the Court concerning his right to re-enter the country.[228] Finally, the Court noted that the conditions of the confinement experienced by Mezei on Ellis Island and the conditions of the confinement experienced by Rodriguez-Fernandez who had been imprisoned in two maximum-security prisons were not comparable.[229] The Court also points out that Mezei voluntarily terminated his efforts to find a new home.[230]

Writing for the Tenth Circuit, Judge Logan pointed out that the detention of excludable aliens was a necessary part of the exclusion process where the entry fiction is applied.[231] Furthermore, the entry fiction was attached to the immigrant's status while they were detained awaiting determination of their parole status and arrangements for their deportation.[232] In addition, the court concluded that excludable aliens cannot invoke constitutional protections in exclusion proceedings due to the application of the entry fiction.[233] Examining the purpose of the detention, the Court noted that the period of the detention was assumed to be temporary in nature.[234] The court declared that the entry fiction could not be used to rationalize the continued detention of these aliens in federal prison.[235] Once INS has exhausted all options to expel the excludable aliens, the court determined that the government must release them.[236] The court held that if the government wanted to continue to detain excludable aliens it must prove that the imposed detention is temporary in nature.[237] In *Rodriguez-Fernandez*, the government could not prove that the petitioner's detention was temporary, and Cuba denied repatria-

225. *See Rodriguez-Fernandez*, 654 F.2d at 1388.
226. *See id.*
227. *See id.*
228. *See id.* at 1384.
229. *See id.* at 1388.
230. *See id.*
231. *See Rodriguez-Fernandez*, 654 F.2d at 1387.
232. *See id.*
233. *See id.* at 1386.
234. *See id.* at 1387.
235. *See id.*
236. *See id.* at 1389-90.
237. *See Rodriguez-Fernandez*, 654 F.2d at 1390 (creating a burden of proof requirement for the government to meet in order to detain excludable aliens).

tion.[238] Thus, the government was ordered to release Rodriguez-Fernandez.[239]

After evaluation of the relevant statutes, the Court explained that the federal government could not detain Mariel Cuban immigrants indefinitely.[240] The Court stated that it interpreted the statutes to only provide for temporary detention.[241] The Court further explained that if the detention was temporary and was used for determination and repatriation purposes then it would be constitutional;[242] otherwise the indefinite detention of Mariel Cubans was unlawful imprisonment.[243]

V. INDEFINITE DETENTION AMOUNTS TO PUNISHMENT

A. *Defining Punishment*

> "Punishment. . . should strike the soul rather than the body. . . the soul is the prison of the body. . ."[244]

In the United States, once a determination of guilt has been made in a criminal proceeding, the court will administer a punishment to the guilty person.[245] Punishment is an action administered by the State intended to inflict pain or other unpleasant consequences on an individual for the commission of an offense.[246] It can be experienced in many forms.[247] The courts consider incarceration one of the harshest punishments that can be imposed.[248] Therefore, the infliction of punishment has always been subjected to the strictest of scrutiny in relation to constitutional pro-

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238. *See id.* at 1389-90.

239. *See id.*

240. *See id.* at 1386 (holding that applicable statutes require petitioner's release).

241. *See id.* at 1386, 1390 (stating that it is the government's burden to prove that the detention is still temporary).

242. *See id.* at 1389 (stating that the detention can only be temporary and for the sole purpose of determining parole eligibility and repatriating the immigrant to his/her country).

243. *See Rodriguez-Fernandez*, 654 F.2d at 1387.

244. MICHEL FOUCAULT, DISCIPLINE AND PUNISH: THE BIRTH OF THE PRISON 3 (1977), *reprinted in* JOHN KAPLAN ET AL., CRIMINAL LAW: CASES AND MATERIALS 51 (3d ed. 1996).

245. *See* JOHN KAPLAN ET AL. CRIMINAL LAW: CASES AND MATERIALS 36 (3d ed. 1996).

246. *See* NIGEL WALKER, WHY PUNISH? THEORIES OF PUNISHMENT REASSESSED 1-3 (1991).

247. *See id.* at 1 (discussing the deterrence effect of different forms of punishment: incarceration, the death penalty, fines and banishment from the community).

248. *See Rodriguez-Fernandez*, 654 F.2d at 1385; *Justification Defenses and Just Convictions*, 24 PAC. L.J. 1233, 1311 (1993).

tections.[249] In criminal law, imprisonment is considered a very special deterrent.[250] Furthermore, in the constitutional contexts, it is considered conclusively punishment.[251]

However, it is well settled that detention itself does not always constitute punishment.[252] The Supreme Court has determined that although freedom from physical restraint is a core liberty "protected by the Due Process Clause from arbitrary governmental action,"[253] this "liberty interest is not [an] absolute".[254] Situations arise where the individual's right to be free from physical restraint is overshadowed by the common good.[255] Hence, the Supreme Court has permitted the government to detain individuals without trial in a small number of situations.[256]

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249. The following cases reflect the strict scrutiny applied to situations where the Court, throughout American history, scrutinized immigration matters in regard to punishment. *Compare* Yick Wo v. Hopkins, 118 U.S. 356, 369 (1886) (noting that aliens that are punished are entitled to Fourteenth Amendment constitutional protections), *with* Abel v. United States, 362 U.S. 217, 232 (1960) (noting that aliens can be arrested by administrative warrant issued without the order of a magistrate).

250. *See* Doe v. Poritz, 142 N.J. 1, 45 662 A.2d 367, 389 (1995).

251. *See id.* at 389-90 (noting that the ex post facto, double jeopardy, and other contexts characterize imprisonment as punishment).

252. For example, the Court has permitted the detention of individuals that were considered dangerous and insane. *See* Addington v. Texas, 441 U.S. 418, 420, 433 (1979) (determining that a mentally ill person may be committed involuntarily if three statutory preconditions are satisfied by clear and convincing evidence). First, the person must be mentally ill. *See id.* at 420. If the person is mentally ill then a determination is made as to whether the individual requires hospitalization to protect him or the public. *See id.* If the individual does need hospitalization to protect the public or themselves, it is next determined whether or not the individual is mentally incompetent. *See id.* at 420; *see also* Korematsu v. United States, 323 U.S. 214, 223 (1944) (establishing that the government may give officials power to incarcerate certain individuals when there is a fear that national security will be compromised). Additionally, the Court has also determined that juveniles may be detained under certain circumstances because children must always be under someone's custody. *See* Schall v. Martin, 467 U.S. 253, 265 (1984). Finally, the Court has allowed the government to detain charged individuals after their arrest, and, if the court determines that probable cause to detain exists, the officials may detain a person pending their trial. *See* Gerstein v. Pugh, 420 U.S. 103, 113-14 (1975); *see also* United States v. Salerno, 481 U.S. 739, 755 (1987) (upholding detention pending trial under the Bail Reform Act of 1984). Although persons who are awaiting bail determinations are held in jails, the law requires that they be housed separate from persons that are sentenced or awaiting sentencing. *See id.* at 748.

253. Foucha v. Louisiana, 504 U.S. 71, 80 (1992).

254. Kansas v. Hendricks, 521 U.S. 346, 356 (1997) (declaring that the liberty interest is not an absolute right even in the civil context); *see also* Jacobson v. Massachusetts, 197 U.S. 11, 26 (1905).

255. *See Hendricks*, 521 U.S. at 356 (providing reasons why a person's rights may be restrained); *Jacobson*, 197 U.S. at 26.

256. *See e.g. Salerno*, 481 U.S. at 755 (upholding detention pending trial under the Bail Reform Act of 1984); *Schall*, 467 U.S. at 265 (stating that in certain situations juveniles

B. *The Criminal—Civil Distinction*

Criminal proceedings are only used to punish an individual for the commission of a crime.[257] Sanctions administered in the civil context, that are deemed to be punishment inflicted on an individual, have always been strictly prohibited by the courts.[258] The Supreme Court, early in American jurisprudence, proclaimed that "[i]t's [the Constitution's] inhibition was levelled at the thing, not the name. . . rights of the citizen should be secure against deprivation for past conduct by legislative enactment, under any form, however disguised."[259]

Although the Supreme Court has not provided an affirmative definition of punishment,[260] it has provided guidance in determining if a state action is civil or criminal in nature.[261] The Court has set forth a collection

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may be detained involuntarily for their protection); *Addington*, 441 U.S. at 420, 433 (holding that a mentally ill person may be committed involuntarily if the three statutory preconditions are satisfied: (1) the person is mentally ill, (2) hospitalization is necessary to protect himself and the public, and (3) the person is mentally incompetent by clear and convincing evidence).

257. *See* United States *ex rel.* Ross v. Wallis, 279 F. 401, 403-04 (2d Cir. 1922) (declaring that any further detention of an alien where remedies have been exhausted under pretense of awaiting deportation amounts to unlawful punishment); Rodriguez-Fernandez v. Wilkinson, 654 F.2d 1382, 1388 (10th Cir. 1981) (noting that federal courts have long held that detention of months amounts to unlawful imprisonment).

258. *See, e.g.*, Kennedy v. Mendoza-Martinez, 372 U.S. 144, 186 (1963) (declaring that a statute which stripped U.S. citizens, who had avoided military service, of their citizenship was punitive and unconstitutional); *Wallis*, 279 F. at 403-04 (inferring that a civil action cannot impose punitive measures on an immigrant).

259. Cummings v. Missouri, 71 U.S. (4 Wall.) 277, 325 (1866).

260. Although the Court has never directly defined punishment, indirectly it has been defined in several ways. First, the Court has defined it according to a prison official's intent. *See* Wilson v. Seiter, 501 U.S. 294, 301 (1991) (finding that the Eighth Amendment requires intent on the part of a prison officer before the conduct qualifies as cruel and unusual punishment). The Court has also indirectly defined punishment as society's expectations in others. *See* Hudson v. McMillian, 503 U.S. 1, 8-10 (1992) (discussing how society's expectations of what constitutes cruel and unusual punishment changes when excessive force is involved). The Court has indirectly defined punishment by its purpose rather than its label. *See* Trop v. Dulles, 356 U.S. 86, 96-98 (1958) (recognizing that the court has generally referred to the purpose of a statute, when determining whether or not it is penal in nature).

261. *See, e.g.*, *Mendoza-Martinez*, 372 U.S. at 165-67 (finding that a statute imposing automatic forfeiture of citizenship upon an individual who left or remained outside of the country in order to avoid military obligations was by its nature a penal statute). The entire range of special procedural protections applicable in criminal proceedings was therefore required. *See id.* at 167; *see also* United States v. Ward, 448 U.S. 242, 249-51 (1980) (clarifying that the seven factors considered in Mendoza-Martinez are material but not *exhaustive or conclusive* in judicial inquiries as to whether certain civil sanctions are so punitive in purpose or effect so as to be considered criminal).

of questions established in its precedents for a court to consider when determining if a sanction is civil or criminal in nature:

- Did the legislature intend to establish a civil proceeding?[262]
- Does the statute inhibit or prevent a person from exercising a legal right or personal action?[263]
- Has this sanction historically been considered punishment?[264]
- Does this sanction require a culpable mental state?[265]
- Does the operation of this statute promote the traditional twin aims of punishment: retribution and deterrence?[266]
- Is the behavior to which it applies already a crime?[267]
- Is there another purpose that can be rationally connected?[268]
- Does this sanction seem excessive in relation to the alternative purpose connected?[269]

The Supreme Court has clarified that this list of considerations is neither complete nor conclusive, but rather a starting point for a judicial inquiry to pursue.[270]

Recognizing that naming a statute "civil" does not make it "civil" in nature,[271] the Supreme Court has held that it will presume Congress' manifested intent to classify a law as civil, unless the challenger provides evidence of the "'clearest proof' that 'the statutory scheme [is] so punitive either in purpose or effect as to negate [the State's] intention' to deem it 'civil'".[272] In such circumstances, the Court will find that the

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262. *See* Kansas v. Hendricks, 521 U.S. 346, 361 (1997); *Mendoza-Martinez*, 372 U.S. at 168-69.

263. *See Mendoza-Martinez*, 372 U.S. at 168 (noting that a sanction involving "an affirmative disability or restraint" has traditionally been seen as punishment).

264. *See id.*

265. *Hendricks*, 521 U.S. at 362 (stating that the presence of a mental state requirement is customarily an important element in distinguishing criminal statutes from civil statutes); *Mendoza-Martinez*, 372 U.S. at 168 (stating that a factor in determining whether a sanction is punishment is whether a finding of a culpable mental state is required).

266. *See Hendricks*, 521 U.S. at 362; *Mendoza-Martinez*, 372 U.S. at 168.

267. *See Mendoza-Martinez*, 372 U.S. at 168.

268. *See Hendricks*, 521 U.S. at 363-64.

269. *See Mendoza-Martinez*, 372 U.S. at 169.

270. *See* United States v. Ward, 448 U.S. 242, 249-50 (1980) (emphasizing that while the Mendoza factors are not "exhaustive nor dispositive," they provide some guidance when attempting to determine whether certain civil sanctions are so punitive in purpose or effect, such that they be deemed criminal).

271. *See Hendricks*, 521 U.S. at 363; Allen v. Illinois, 478 U.S. 364, 369 (1986); *Ward*, 448 U.S. at 248-49.

272. *Hendricks*, 521 U.S. at 363 (quoting Ward, 448 U.S. at 248-49).

statute established a criminal proceeding for constitutional purposes.[273] In matters of detention, where loss of liberty is the deprived interest, the search for a hidden intent is appropriate because it represents the deprivation "of all that makes life worth living".[274]

C. *INS Inflicts Criminal Sanction*

Applying the factors which determine whether or not a civil action is really criminal in nature to the detention that is imposed on Mariel Cubans by INS suggests that that the indefinite detention of immigrants by INS is a form of punishment. The effect of indefinite detention on the immigrant is punitive in nature, thus negating its civil label.[275] The express purpose of detention is to detain excluded immigrants deemed inadmissible while arrangements for their return to their homeland are made.[276] However, there is a hidden intent. INS officials are aware that Cuba refuses to repatriate excluded aliens.[277] Moreover, Congress is aware that Cuban immigrants are being detained for indefinite periods and sometimes permanently by INS.[278] In light of this fact, it is sophistry to say that the expressed intent of the detention is temporary in nature because the Mariel Cubans are awaiting deportation. The INS is using indefinite arbitrary imprisonment to exclude aliens deemed inadmissible, which is unlawful punishment.[279]

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273. *See Allen*, 478 U.S. at 369 (stating that where there is clear proof that a civil statute has a punitive effect, it will negate the State's intent and thus, establish a criminal proceeding).

274. *See* Ng Fung Ho v. White, 259 U.S. 276, 284-285 (1922).

275. *See* Rodriguez-Fernandez v. Wilkinson, 654 F.2d 1382, 1385 (10th Cir. 1981) (stating that the conditions of the detention faced by the petitioner, a Mariel Cuban, constituted imprisonment under conditions as severe as those applied to the worst criminals); *see also* HAMM, *supra* note 20, at 88 (reporting on findings by the House of Representatives during an inspection of the Atlanta penitentiary, which showed a large number of suicides, attempted suicides, and incidences of self-mutilation among the Mariel Cubans resulting from brutal and inhumane conditions of confinement).

276. *See* Barrera-Echavarria v. Rison, 21 F.3d 314, 315 (9th Cir. 1994) *rev'd* 44 F.3d 1441 (9th Cir. 1995) [*Echavarria I*]; *Rodriguez-Fernandez*, 654 F.2d at 1387 (inferring that excluded aliens must be detained only temporary, while INS determines suitability or arranges deportation).

277. *See* Gisbert v. U.S. Attorney Gen., 988 F.2d 1437, 1439 (5th Cir.); Alvarez-Mendez v. Stock, 941 F.2d 956, 958 (9th Cir. 1991); *Rodriguez-Fernandez*, 654 F.2d at 1384.

278. *See Echavarria II*, 44 F.3d 1441, 1447 nn.4-5 (9th Cir. 1995) [*Echavarria II*] (illustrating the numerous congressional hearings that have informed the government of the situation concerning the Mariel Cubans who are indefinitely detained in federal prisons).

279. *See Rodriguez-Fernandez*, 654 F.2d at 1386 (declaring that INS is using detention as a form of exclusion rather than as a step in the process of returning petitioner, a Mariel Cuban, to his homeland); Bonder v. Johnson, 5 F.2d 238, 239 (D. Mass. 1925) (finding that indefinitely detaining an alien is unlawful punishment); *see also* United States *ex rel.* Ross v. Wallis, 279 F. 401, 403-04 (2d Cir. 1922) (stating that further detention, after remedies

Excluded aliens are held involuntarily and have lost their right to be free of physical restraint.[280] Clearly, this is a form of affirmative restraint. Most excluded aliens that cannot be returned to their homelands are held in federal and state correctional facilities of all security levels, regardless of their propensity to be violent.[281] Immigrants detained in American jails and prisons are treated the same as individuals serving criminal sentences or awaiting disposition of their cases.[282] These detainees are subjected to the same prison conditions as the rest of the prison population.[283] The correctional staff does not institute non-penal measures to deal with INS detainees.[284] In fact, some facilities have adopted more stringent security measures against Cubans in particular.[285]

Imprisonment has always been considered the harshest form of punishment that government can inflict upon individuals.[286] While the nature of the imprisonment has changed, it has always been considered a form of punishment. Early in the nineteenth century, the penitentiary model was

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have been exhausted by an alien being detained while awaiting deportation, amounts to unlawful imprisonment).

280. *See Gisbert*, 988 F.2d at 1443.

281. *See* HAMM, *supra* note 20, at 68-69 (noting that non-violent Cuban detainees were detained in a maximum security prison in Atlanta); Interview with D'Ann Johnson, *supra* note 2 (reporting that one of her clients was transferred from the Bastrop County Jail to the federal prison in Talladega, La., where he is being held in 23 hour lockdown segregation in spite of the fact that he was convicted of a minor drug possession offense).

282. *See* Barrera-Echavarria v. Rison, 21 F.3d 314, 316 (9th Cir. 1994), *rev'd*, 44 F.3d 1441 (9th Cir. 1995) [*Echavarria I*] (recognizing that Barrera, a Mariel Cuban, has been a prisoner in the fullest sense). He has been subjected "to all the deprivations inflicted by law on those found guilty of federal crimes, a prisoner now incarcerated in the most restrictive kind of institution in the federal penal system, his companions convicted felons". *Id.*

283. *See id.* at 316; Human Rights Watch, *supra* note 7 (detailing in graphic terms, the conditions that these immigrants are subjected to in correctional facilities); Interview with D'Ann Johnson, *supra* note 2 (stating that her clients in the Bastrop County Jail, the Victoria County Jail, the Bastrop federal prison and the thirty-three un-represented detainees in the Three Rivers federal prison are all treated the same as the general prison population). They are subjected to the dangers of the environment including overcrowding, assault from dangerous felons, isolation, inadequate nutrition, poor medical care, and for some, continuous solitary confinement. *See id.*

284. *See, e.g., Echavarria I*, 21 F.3d at 316 (explaining that the facilities where Mariel Cubans are detained are described as correctional). "[T]heir inhabitants" are "offenders" and the administrator's goal is "a balance between punishment, deterrence, incapacitation, and rehabilitation". *Id.*

285. *See* Interview with D'Ann Johnson, *supra* note 2 (revealing that two of her Mariel Cuban clients who had not been convicted of violent crimes, were transferred from the Bastrop County Jail to the Talladega federal facility in Alabama where they are being held in 23 hour lockdown). According to Ms. Johnson, this facility's internal policy, since the riots in 1987, is to keep all Cubans in segregation 23 hours a day with one hour of recreation time where the detainee is kept in shackles. *See id.*

286. *See* Wong Wing v. United States, 163 U.S. 228, 238 (1896).

employed.[287] Today, the goals of those inflicting punishment remain the same.[288]

It is easy to discern that the twin aims of punishment, retribution and deterrence, are promoted by the indefinite detention of excluded aliens.[289] Because Mariel Cubans are detained primarily in correctional facilities and INS detention centers modeled after correctional facilities, these immigrants are subjected to the conditions of imprisonment experienced by convicted criminals,[290] where they experience the goals of punishment, retribution and deterrence.[291] Unlike the mentally ill who had no choice,[292] many of the Mariel Cubans that are detained would not have voluntarily undertaken the dangerous ocean journey to the United States if they had been aware that they or their family members could be imprisoned for life if the United States government determined that they were not suitable for admission.[293]

While the government asserts that the Mariel Cubans are being temporarily detained awaiting deportation,[294] in reality, Mariel Cubans cannot be deported,[295] therefore INS imprisons Mariel Cubans in American pris-

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287. *See* DAVID ROTHMAN, THE DISCOVERY OF THE ASYLUM 79-88, 105, 107 (1971), *reprinted in* JOHN KAPLAN ET AL., CRIMINAL LAW CASES AND MATERIALS 47 (3d ed. 1996).

288. *See generally* U.S.S.G., 18 U.S.C.A. Ch. 1, Pt.A, Intro. Comment (West 1996) (proclaiming that the purpose of the federal guideline system is to provide policies and practices for the application of criminal punishment that meet the basic principles of punishment: deterrence, incapacitation, and rehabilitation); *Echavarria I*, 21 F.3d at 316 (explaining that the administrator's goal of the federal facilities that house Mariel Cuban detainees, is "a balance between punishment, deterrence, incapacitation, and rehabilitation").

289. *See Echavarria I*, 21 F.3d at 316.

290. *See* Rodriguez-Fernandez v. Wilkinson, 654 F.2d 1382, 1385 (10th Cir. 1981) (stating that the conditions of confinement are the same as those applied to the worst criminals).

291. *See Echavarria I*, 21 F.3d at 316. (explaining that the facilities where Mariel Cubans are detained are described as correctional and their inhabitants are "offenders," and the administrator's goal is "a balance between punishment, deterrence, incapacitation, and rehabilitation").

292. Cf. Kansas v. Hendricks, 521 U.S. 346, 347 (1997) (noting that a mentally ill person would have an abnormal volitional capacity).

293. *See* Interview with D'Ann Johnson, *supra* note 2.

294. *See Rodriguez-Fernandez*, 654 F.2d at 1387.

295. *See* Gisbert v. U.S. Attorney Gen., 988 F.2d 1437, 1439 (5th Cir.) (acknowledging that Cuban nationals who had been ordered excluded from the United States would not be accepted by Cuba); Alvarez-Mendez v. Stock, 941 F.2d 956, 958 (9th Cir. 1991) (stating that Cuba refuses to accept the repatriation of petitioner, a Mariel Cuban); *Rodriguez-Fernandez*, 654 F.2d at 1384 (noting that Cuba has refused all requests to accept petitioner); LEGOMSKY, *supra* note 21, at 58 (stating that the United States sought to return Mariel Cubans to Cuba, but that Cuba refused to accept them).

ons permanently and indefinitely.[296] Several of those detained over the last two decades determined that it was better to be dead than to languish in prison for life.[297] The reality of the situation is demonstrated by the large number of suicides, attempted suicides, and incidences of self-mutilation among the Mariel Cubans detained in federal penitentiaries.[298]

The presence of culpability on the part of the excluded alien is irrelevant in the determination of whether the indefinite detention is civil or criminal. This is due to the fact that in some criminal instances, punishment can be administered without culpability on the part of the offender.[299] While some have argued that the absence of culpability is a violation of due process, the Supreme Court has rejected this position.[300] In *Shevlin*, the Court concluded that even without requiring culpability, the government may punish in maintenance of a public policy.[301]

Permanent imprisonment in American correctional facilities is not an appropriate method of excluding aliens deemed inadmissible.[302] There is no rational nexus between the "temporary detention of an excluded alien awaiting deportation" and the permanent incarceration in the United States of an excluded alien.[303] It is reasonable to conclude that an alien permanently detained by INS in a correctional facility is being punished just like a convicted criminal.[304] In part this conclusion can be reached

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296. *See* Coalition to Support Cuban Detainees, *supra* note 52 (indicating that Mariel Cubans have been detained indefinitely for years without any release date); Human Rights Watch, *supra* note 7 (reporting that immigrants who are awaiting deportation are held indefinitely by INS because they cannot return to their homeland nor can they be accepted by a third country).

297. *See* HAMM, *supra* note 20, at 114 (providing an example that at one point in time over 300 Mariel Cubans chose to commit slow suicide by not eating in the Atlanta Penitentiary).

298. *See id.* at 115 (suggesting that approximately one third of the Mariel Cubans detained at the Atlanta Penitentiary made serious suicide attempts before the riots). Moreover, Atlanta Penitentiary records revealed that from 1982 and 1987 there were ten official suicides, 158 serious suicide attempts, and more than 2,000 serious incidents of self-mutilation. *See id.* at 114.

299. *See* Shevlin Carpenter Co. v. Minnesota, 218 U.S. 57, 69-70 (1910).

300. *See id.*

301. *See id.* at 70.

302. *See* Human Rights Watch, *supra* note 7.

303. *See* Rodriguez-Fernandez v. Wilkinson, 654 F.2d 1382, 1387 (10th Cir. 1981) (discussing differences of imprisonment between temporary detention and permanent incarceration).

304. *See Echavarria I*, 21 F.3d 314, 316 (9th Cir. 1994), *rev'd*, 44 F.3d 1441 (9th Cir. 1995); *Rodriguez-Fernandez*, 654 F.2d at 1385; *see also* Human Rights Watch, *supra* note 7; Interview with D'Ann Johnson, *supra* note 2 (stating that the excluded Cubans held within the San Antonio INS District at the Bastrop County Jail, the Victoria County Jail, the Bastrop federal prison and the thirty-three un-represented detainees in the Three Rivers federal prison are treated no differently than other prisoners who are incarcerated in pris-

because most Americans have determined that indefinite imprisonment is reserved for the most violent of criminals, repeat offenders, and first-degree murders.[305]

The indefinite detention of excluded immigrants in prison because they cannot be returned to their homelands is shamefully abhorrent.[306] When an excludable alien cannot be deported in a reasonable period of time, the resulting indefinite detention is unlawful imprisonment.[307] The INS claims to utilize the indefinite detention of immigrants as a way to protect the American public.[308] Although INS does not provide proof that the immigrant is actually dangerous, it still requires exclusion of the immigrant from the public at large.[309] In contrast, when indefinite detention has been imposed on mentally ill individuals without proof of "danger-

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ons because of criminal acts they committed). They are also subject to the same dangerous conditions of prison environment including overcrowding, assault from dangerous felons, isolation, inadequate nutrition, poor medical care, and for some continuous solitary confinement. *See id.*

305. Most of us have a sense of the seriousness of an individual's crime based upon the harshness of the punishment inflicted. *See* Joel Feinberg, *Doing and Deserving*, in CRIMINAL LAW CASES AND MATERIALS 88 (3rd ed. 1996) (stating that punishment is a device used to express the public attitudes of indignation, resentment and judgment of disapproval). Others have clarified this position further and have stated that punishment is more than mere expression, it is communication to the offender. *See* Carol S. Steiker, *Punishment and Procedure: Punishment Theory and the Criminal-Civil Procedural Divide*, 85 GEO. L. J. 775, 803 (1997). In this way, punishment communicates blame. *See id.* at 803. Legal scholar Carol S. Steiker, focusing on the additional characteristic of blaming advances a three-part analysis of determining whether a state action is punishment. *See id.* at 804. In her analysis, the intention of the State's must first be identified. *See id.* at 810. Secondly, the effect of the state's action on the individual must be assessed. *See id.* at 811. Finally, it must be determined what the community would understand the state's action to mean. *See id.* at 811. Steiker recognizes that this is not an inquiry that courts currently make, however, she argues that it is central to a determination of punishment because "it recognizes that the creation of social meaning is a significant function of all state action". *Id.* at 811.

306. *See Echavarria I*, 21 F.3d at 319 (proclaiming that "Some evils are too great for any margin to be given them. The practice of administratively imprisoning persons indefinitely is not a process tolerable in use against any person in any corner of our country").

307. *See Rodriguez-Fernandez*, 654 F.2d at 1387-90; United States *ex rel.* Ross v. Wallis, 279 F. 401, 403-04 (2d Cir. 1922).

308. The court further noted that the government has a duty to protect those it governs. *See Echavarria I*, 21 F.3d at 318. However, "when the government uses illegitimate means to provide protection, when, for example, as here, the government imprisons a person it deems dangerous without charge, trial, or conviction," it is betraying this duty. *Id.* Finally, the Court admonished the government for asserting that it has incarcerated a Havana pickpocket for eight years in federal prison for preventive purposes. *See id.*

309. *See* Interview with D'Ann Johnson, *supra* note 2 (noting that INS is not required to provide evidence supporting any of its parole determinations).

ousness," the act of civil detention has been found to be unconstitutional.[310]

D. *Punishment: Outside the Scope of INS Power*

Immigration proceedings are considered civil proceedings rather than criminal proceedings.[311] Thus, aliens may be "arrested" by INS on an administrative warrant issued without the order of a magistrate,[312] and held without bail.[313] Although there have been times when the courts have recognized that the actions of the federal government in immigration matters are so punitive that the aliens are in effect being punished.[314] When punishment is inflicted, the proceeding is no longer civil in nature but instead constitutes a criminal proceeding.[315] The imposition of indefinite detention by the INS on immigrants is a form of punishment.[316] The infliction of punishment in this manner is unlawful.[317] By imposing punishment on excluded immigrants without the benefit of constitutional due process protections, INS is acting outside its scope of authority.

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310. *See generally* Addington v. Texas, 441 U.S. 418, 421, 426-33 (1979) (stating that unless Texas courts find by a standard of clear and convincing evidence, or greater, that (1) the person is mentally ill and (2) that such person needs to be hospitalized for his and the public's protection, the statute is unconstitutional and no due process exists).

311. *See* INS v. Lopez-Mendoza, 468 U.S. 1032, 1038 (1984) (stating that "a deportation proceeding is a purely civil action"); Fragedela v. Thornburgh, 761 F. Supp. 1252, 1255 (W.D. La. 1991) (emphasizing that immigration proceedings and detention are not criminal proceedings or punishment).

312. *See* Abel v. United States, 362 U.S. 217, 242 (1960) (Douglas, J., dissenting) (noting the possible harm that can result from the fact that INS officials do not have to go to a magistrate to obtain warrants of arrest).

313. *See* Carlson v. Landon, 342 U.S. 544-47 (1952).

314. *See* Wong Wing v. United States, 163 U.S. 228, 237-38 (1896) (holding that aliens subjected to hard labor are being punished); Rodriguez–Fernandez v. Wilkinson, 654 F.2d 1382, 1387 (10th Cir. 1981) (noting that federal courts have long held that more than a few months detention of aliens awaiting deportation amounts to unlawful imprisonment); United States *ex rel.* Ross v. Wallis, 279 F. 401, 403-04) (2d Cir. 1922) (declaring any further detention of an alien under the pretense of awaiting deportation where remedies have been exhausted amounts to unlawful punishment).

315. *See* Yick Wo v. Hopkins, 118 U.S. 356, 369 (1886); *Rodriguez-Fernandez*, 654 F.2d at 1386.

316. *See generally Wong Wing*, 163 U.S. at 237-38 (stating that although the federal government may detain an alien pending exclusion, the order of exclusion by summary punishment to a labor camp is unlawful); *Rodriguez–Fernandez*, 654 F.2d at 1388-90 (holding that aliens awaiting deportation must be released because such confinement amounts to unlawful imprisonment); *In re* Bonder v. Johnson, 5 F.2d 238, 239 (D. Mass. 1925) (finding that detaining an alien past the point of time needed to determine immigration status is unlawful punishment which is not part of the admission process); *Wallis*, 279 F. at 403-04 (declaring any further detention of an alien where remedies have been exhausted under pretense of awaiting deportation amounts to unlawful punishment).

317. *See Rodriguez-Fernandez*, 654 F.2d at 1386.

VI. ALTERNATIVE TO INDEFINITE DETENTION

The detention of immigrants is essential to the immigration process because it allows the United States government to regulate the flow of immigrants into the country.[318] Reflecting on the history of immigration policy, this country has long maintained, as a fundamental aspect of its right to self-determination, the prerogative to determine how many and which outsiders, without any cognizable ties to this society, will be permitted to become members of it.[319] Clearly, a sovereign nation should have the inherent power to regulate immigration across its borders. However, it seems unreasonable for the citizens of the United States to want the world to believe that, a country which has long prided itself as the land of the free, is in reality a country that inhumanely punishes immigrants by detaining them indefinitely as a form of exclusion. Although Congress has absolute power over immigration, it does not have absolute power over the infliction of punishment on immigrants regardless of their legal status.[320]

Therefore, Congress must create an alternative to indefinite detention to avoid inflicting arbitrary punishment on immigrants who are deemed removable and cannot be returned to their homelands. An alternative to indefinite detention could be accomplished by establishing a uniform, standardized system of statutorily mandated due process procedures to be applied in all exclusion proceedings similar to the ones instituted in the Kansas Sexually Violent Predator Act (Act).[321] Although excluded aliens do not have constitutional due process protections, Congress does have the authority to create statutory due process safeguards to protect excluded immigrants.[322]

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318. *See* Shaughnessy v. United States *ex rel.* Mezei, 345 U.S. 206, 215 (1953); *see also Rodriguez-Fernandez*, 654 F.2d at 1388.

319. *See generally* Immigration and Nationality Act of 1952 § 202, 8 U.S.C.A. § 1152 (West 1999) (outlining the limits placed on immigrant visas); *see also* Leng May Ma v. Barber, 357 U.S. 185, 188 (1958); Shaughnessy v. United States *ex rel.* Mezei, 345 U.S. at 215; Gisbert v. U.S. Attorney Gen., 988 F.2d 1437, 1440 (5th Cir.); *Rodriguez-Fernandez*, 654 F.2d at 1387.

320. In fact, the Supreme Court has suggested that an alien has a right to a fair hearing along with a decision in conformity with statute. *See* Brownell v. Tom We Shung, 352 U.S. 180, 182 n.1 (1956). Additionally, any person found within the U.S. is entitled to Fifth Amendment protections. *See id.*

321. *See* Kansas v. Hendricks, 521 U.S. 346, 350-57 (1997).

322. *See* Shaughnessy v. United States *ex rel.* Mezei, 345 U.S. at 212.

A. *The Hendrick's Model Of Due Process*

Although the Supreme Court has never granted certiorari to any case involving the indefinite civil detention of immigrants,[323] the Supreme Court has considered the constitutionality of a statute that allows the potentially indefinite civil detention of sex offenders.[324] In *Kansas v. Hendricks*,[325] the Court determined that the Kansas Sexually Violent Predator Act (Act)[326] did not establish a criminal proceeding.[327] There-

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323. The following cases regarding the indefinite detention of Mariel Cubans were denied certiori by the United States Supreme Court: Barrera-Echavarria v. Rison, 44 F.3d 1441, (9th Cir. 1994) *cert. denied* 516 U.S. 976 (1995) [*Echavarria II*]; Alvarez-Mendez v. Stock, 941 F.2d 956 (9th Cir. 1991) *cert. denied*, 506 U.S. 842 (1992).

324. *See Hendricks*, 521 U.S. at 346.

325. 521 U.S. 346 (1997). In 1984 after serving almost 10 years of his sentence, the defendant anticipated release to a halfway house. *See id.* at 353-54. However a petition seeking Hendricks' civil confinement was sought and granted. *See id.* at 354. Defendant moved for a dismissal stating that the statute violated several federal constitutional provisions. *See id.* After his evaluation, Hendricks requested a jury trial to determine whether or not he qualified as a sexually violent predator. *See id.* At that time, Hendricks testified to an extensive history of perpetration of sexual offenses against children. *See id.* In addition, Hendricks testified that the only way to ensure that he no longer molested children was "to die". *Id.* at 355. The jury found beyond a reasonable doubt that he was a sexually violent predator. *See id.* at 355. The trial court determined as a matter of law that he fit the criteria of mentally abnormal as defined by the Act. *See id.* at 355-56. Hendricks appealed alleging that the Act violated the Federal Constitution's Due Process, Double Jeopardy, and Ex Post Facto Clauses. *See id.* at 355-56. The Kansas Supreme Court agreed with Hendricks' Due Process claim. *See id.* Here, the court determined that in order for a person to be involuntarily committed in a civil proceeding, "substantive" due process requires that clear and convincing evidence be presented by the State that proves that the person is (1) mentally ill and (2) a danger to himself or others. *See id.* This Court declared that the Act's definition of mentally abnormal did not satisfy these criteria. *See id.*

326. *See id.* at 350. The Kansas Legislature explained that the existing involuntary civil commitment statute was inadequate to deal with the potential risks associated with sexually violent predators. *See id.* Additionally, the legislature argued that these violent sexual predators have anti-social personality features, which are disorders that cannot be treated by existing mental illness treatment approaches. *See id.* at 351. As a result, this population requires a long-term treatment with specialized treatment modalities, which are very different from treatment modalities generally used. *See id.* Therefore, the Kansas legislature felt justified in creating the Act. *See id.* Under the Act, the civil commitment procedures pertain to any individual who is:

> (1) a presently confined person who, like Hendricks, "has been convicted of a sexually violent offense" and is scheduled for release; (2) a person who has been "charged with a sexually violent offense" but has been found incompetent to stand trial; (3) a person who has been found "not guilty by reason of insanity of a sexually violent offense"; and (4) a person found "not guilty" of a sexually violent offense because of a mental disease or defect.

KAN. STAT. ANN. § 59-29a03(a), § 22-3221 (1995).

327. *See* Kansas v. Hendricks, 521 U.S. 346, 369 (1997) (holding that because the State did not act with punitive intent, the Act was not a criminal proceeding).

fore, the potentially indefinite detention imposed on Hendricks, a repeat sex offender, was not a form of punishment.[328] In *Hendricks*, the Act allows the local prosecutor to seek involuntary detention of individuals for treatment "[w]ho have been convicted of or charged with a sexually violent offense" and who are likely to commit "predatory acts of sexual violence" due to a "mental abnormality" or "personality disorder," for treatment until the person's condition has improved to the point that he is no longer considered a danger.[329]

The transfer of the individual from imprisonment to civil detention is effected in a series of steps laid out in the Act.[330] First, the custodial agency is required to notify the local prosecutor ninety days before the expected release date of the individual.[331] Next, the prosecutor is obligated to file a petition in state court seeking the involuntary commitment of this individual within seventy-five days.[332] At this point, the court determines whether there is probable cause to find that the individual is a "sexually violent predator."[333] If such a determination is made, the individual is transferred to a secure facility where a professional evaluation is conducted.[334] After that evaluation has been completed, a trial is held where the court or a jury is asked to determine beyond a reasonable doubt whether the individual is a sexually violent predator.[335] If the court, or a unanimous jury, determines that the individual meets the statutory criteria, the individual is transferred to the custody of the Secretary of Social and Rehabilitation Services for "control, care and treatment until such time as the person's mental abnormality or personality disorder has so changed that the person is safe to be at large."[336]

In order to ensure that the individual's confinement is not punitive in nature, the Kansas legislature included several procedural due process protections to be followed from the time of the initial hearing through the entire period of detention. First, if the individual is an indigent, the State is required to furnish counsel and an independent psychiatric examination at public expense.[337] In addition, during the proceeding to determine the need for treatment, the individual has the right to present and

328. *See id.*
329. *Id.* at 352.
330. *See id.* at 352-53.
331. *See* KAN. STAT. ANN. § 59-29a03 (Supp. 1998).
332. *See id.* at § 59-29a04.
333. *See id.* at § 59-29a05(a).
334. *See id.* at § 59-29a05(d).
335. *See id.* at §§ 59-29a06-59-29a07.
336. *Id.* at § 59-29a07.
337. *See* KAN. STAT. ANN. § 59-29a06. (Supp. 1998).

cross-examine witnesses, and the opportunity to review all documentary evidence, which the State has presented.[338]

The Act also provides the confined person with three different ways to review the necessity of their continued confinement.[339] The primary review process requires the court, granting the commitment, to conduct an annual hearing to determine whether or not continued detention is permissible.[340] The second method of review permitted by the Act is the ability of the Secretary of Social and Rehabilitation Services to request a hearing in order to determine whether or not the condition of the individual has changed, and upon such finding to allow the individual to petition for release.[341] Finally, on his or her own accord the confined person can at any time file a petition for release.[342] Regardless as to who initiates the review hearing, if the court determines that the State has failed to prove beyond a reasonable doubt that further detention is warranted, the detained individual will be set free.[343]

In *Kansas v. Hendricks*, the petitioner asserted that the civil detention imposed by the Act was punishment and a violation of the Double Jeopardy and *Ex Post Facto* Clauses of the Constitution, because the detention was based on past conduct for which he had already been convicted and had served a term of imprisonment.[344] Hendricks claimed that the detention imposed on him was a form of punishment because of the "potential indefiniteness" of the detention and the State's failure to provide legitimate treatment.[345] Justice Thomas, writing the opinion for the Court, rejected Hendricks' assertion that the conditions of the confinement were punitive in nature.[346] In reaching its opinion, the Court found that an individual confined under the Act was held in less restrictive conditions than those confined in state prisons, more like the conditions of those confined in a state hospital.[347]

The Court further rejected Hendricks' argument that the potential indefinite duration of his confinement indicated the State's punitive intent.[348] Instead, the Court noted that the duration of the confinement was linked to the stated purposes of the detention, which was to detain

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338. *See id.* at § 59-29a06(c)
339. *See id.* at § 59.29a08 – 59-29 a11; Kansas v. Hendricks, 521 U.S. 346, 353 (1997).
340. *See* KAN. STAT. ANN. § 59-29a08(a) (Supp. 1998); *Hendricks*, 521 U.S. at 353.
341. *See* KAN. STAT. ANN. § 59-29a010 (Supp. 1998); *Hendricks*, 521 U.S. at 353.
342. *See* KAN. STAT. ANN. § 59-29a011 (Supp. 1998); *Hendricks*, 521 U.S. at 353.
343. *See Hendricks*, 521 U.S. at 353.
344. *See id.* at 360-61.
345. *See id.* at 363.
346. *See id.* at 363.
347. *See* Kansas v. Hendricks, 521 U.S. 346, 363 (1997).
348. *See id.* at 363.

him until his mental condition was no longer a threat to others.[349] The Court held that it was permissible to leave the length of confinement undetermined because it was difficult for the State to foresee when an individual would recover from mental illness or if they would ever recover from it.[350] Therefore, an indeterminate period of confinement with periodic reviews was considered permissible.[351] Moreover, the Court relied on the fact that the longest an individual would be considered incapacitated was one year, because a state court will once again determine beyond a reasonable doubt whether or not the individual continues to meet the initial criteria established for commitment.[352]

B. *Hendrick's Model: Due Process for Mariel Cubans*

The goal of the State of Kansas in detaining sexual predators, and the goal of the federal government in detaining excluded aliens are similar in nature. Both entities are attempting to protect American citizens from potentially dangerous individuals.[353] As a result, it is reasonable to believe that the enactment of a model of statutory due process similar to the statutory due process safeguards created by the Act would accomplish the same federal governmental goals. Inherently, the enactment of a statutory model of due process similar to that created by the Act would simultaneously ensure the safety of the public and provide due process safeguards for immigrants who have been deemed inadmissible and cannot be returned to their homelands. Under the current law, Congress has the power to create procedural due process for excludable immigrants.[354] Thus, in whatever way Congress chooses to exercise this power, it would be in compliance with the law.[355]

Like the sex offender facing an indefinite term of civil detention, the indefinitely detained immigrant requires access to counsel to avoid the imposition of a punitive effect.[356] The significance of the deprived interest, loss of physical liberty for an indefinite period of time, requires that such a person have the assistance of legal counsel in ensuring that the

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349. *See Hendricks*, 521 U.S. at 363 (providing the basis for the Court's reasoning that the confinement's duration is linked to a stated purpose).

350. *See id.* at 363-64.

351. *See id.* at 364 (concluding that the ACT does not inflict punitive punishment and provides necessary procedural due process safeguards).

352. *See id.* (expanding on the procedural safeguards found in the statute).

353. *See id.* at 351; United States *ex rel.* Knauff v. Shaughnessy, 338 U.S. 537, 546 (1950).

354. *See* United States *ex rel.* Knauff v. Shaughnessy, 338 U.S. at 544.

355. *See id.* at 543-44 (suggesting that due process for excludable aliens is defined, at any given time, by Congressional authority).

356. *See* Singleton, *supra* note 104, at B7 (illustrating that the American Bar Association position is that detained aliens need access to counsel).

proposed statutory due process system is adequately and fairly administered. Furthermore, the indefinitely detained immigrant should have the right to present and cross-examine witnesses along with the opportunity to review all documentary evidence presented by the government. In light of the potential harm experienced by the indefinitely detained immigrant, a higher level of due process should be established as has been provided to sex offenders in Kansas detained under the Act to avoid the imposition of punishment. Although the detention hearings created by the Act are civil in nature, the Kansas Legislature decided to impose a higher level of due process protection than usually applied in a civil proceeding to ensure the avoidance of a punitive effect.[357]

Along with assistance from legal counsel and freedom to review and challenge the evidence used by the government to support its case of detention, the indefinitely detained immigrant should be given the opportunity to review the terms of his confinement before a United States District Court. Due to the serious nature of the individual deprivation, the government should be required to prove beyond a reasonable doubt that the immigrant is a danger and must be detained further until his country will receive him or he is no longer considered dangerous, which ever comes first. Similarly, once INS has determined that an immigrant must be detained pending deportation and the immigrant will not be accepted by their country or a third country, INS should be required to file a complaint with the appropriate district court and a jury trial set to determine beyond a reasonable doubt whether or not the immigrant is dangerous and continued detention is warranted. The district court should review the continued detention of the immigrant annually and appeal through a writ of habeas corpus should be left intact. Furthermore, it is essential that the procedures for obtaining an adequate sponsor or placement be a part of the judgment of the court providing notice to the indefinitely detained excluded immigrant of what conditions must be met to be eligible for parole.

In order to provide for uniformity among INS districts, all INS districts should be required to follow this proposed process. Determining the issue of continued dangerousness before a judge and a jury would allow the indefinitely detained person to undergo a process that meets the goals of the government and protects her personal liberty interest—to be free from arbitrary physical restraint.

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357. *See Hendricks*, 521 U.S. at 346.

VII. CONCLUSION

Most Americans would find it hard to believe that in the United States newly arrived immigrants who are denied admission by INS, and cannot be deported, are indefinitely detained in correctional facilities without the benefit of constitutional protections.[358] Currently, under the laws of the United States the indefinite civil detention of Cubans in correctional facilities without constitutional due process protection is not considered a criminal sanction or a violation of the Constitution.[359] In reality, however, the incarceration of excluded immigrants who cannot be deported has become a life sentence.[360] Life imprisonment is one of the harshest punishments imposed in our society and is viewed as punishment. Although the indefinite detention of Cuban immigrants arises from a civil proceeding, such a result is punishment. The immigration power, which is conferred on the executive branch by the Congress, does not include the power to punish.[361]

Indefinite detention is not a relic of the Mariel Boatlift. The growing number of excluded immigrants who cannot be returned to their homelands continues to rise as INS detains and deports immigrants in record numbers.[362] Due to the recent changes in immigration law, the number of immigrants indefinitely detained by INS will continue to grow exponentially.[363] INS is coping with a detention situation that it cannot handle,[364] and is thwarted by inadequate statutory guidance from Congress.[365] Judges and attorneys across the country are once again

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358. *See* Shaughnessy v. United States *ex rel.* Mezei, 345 U.S. 206, 214-15 (1953).

359. *See* Gisbert v. U. S. Attorney Gen., 988 F.2d 1437, 1442-44 (5th Cir. 1993) (finding that the indefinite period of the detention is not punishment because it is in the context of an immigration proceeding where excluded Cubans have no due process rights). *But see* Wong Wing v. United States, 163 U.S. 228, 237 (1896) (holding that when INS punishes immigrants it violates their due process rights).

360. *See generally* HAMM, *supra* note 20, at 52 (giving an account of a man who has been held for over 14 years).

361. *See* Rodriguez-Fernandez v. Wilkinson, 654 F.2d 1382, 1386 (10th Cir. 1981) (declaring that INS is using detention as a form of exclusion rather than a step in the process of returning Mariel Cubans to their homeland); Petition of Brooks, 5 F.2d 238, 239 (D. Mass. 1925) (inferring that indefinitely detaining an alien is unlawful punishment); *see also* United States *ex rel.* Ross v. Wallis, 279 F. 401, 403-04 (2d Cir. 1922) (stating that further detention, after remedies have been exhausted by detained alien awaiting deportation, amounts to unlawful imprisonment).

362. *See* John J. Murphy III, *Representing Immigration Detainees Presents Unusual Challenges*, 154 N.J. L.J. 921 (Dec. 14, 1998).

363. *See id.* (reporting that INS will experience a 7% increase in the number of immigrants detained by the year 2000.

364. *See id.*

365. *See id.* (noting that INS has failed to adopt rules and regulations to cope with the influx of immigration detainees, and Congress has failed to provide any guidance).

wrestling with the constitutional issues raised by indefinitely detaining immigrants as a form of exclusion in correctional facilities without judicial review.[366]

Almost twenty years after the arrival of the Mariel Cubans, President Clinton invited more than 20,000 refugees from Kosovo, Yugoslavia to the United States to escape their war-torn country.[367] These refugees find themselves physically located within the United States without the most basic constitutional protections because they have not been legally admitted into the country.[368] What will INS do with those refugees determined not suitable to remain within the country? The adoption of a substantive and uniform statutory procedural scheme would alleviate the practical and moral dilemma faced by the United States government by providing a system which fairly and humanely reviews the need for the continued detention of the excluded immigrant held within the United States while protecting American citizens. Common sense and humanity must become a part of the INS process, which currently results in the indefinite detention of excluded immigrants who are within the United States and cannot be returned to their homelands.

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366. *See* Lisa Olsen, *5 Judges to Review Lifers INS Custody Ruling May Set Nationwide Precedent*, SEATTLE POST-INTELLIGENCE, Apr. 19, 1999 at A1, (reporting that five federal district court judges decided to hold a joint hearing that would determine the fate of 150 immigrants indefinitely detained in facilities located within the Western District of Washington). In addition, members of the American Bar Association angered by the legal plight of immigrants indefinitely detained without the benefit of counsel entered negotiations with the Department of Justice to force INS to extend due process rights to all immigrants detained including the right of counsel and improved living conditions. *See* Daryl Van Duch, *ABA Goes Over the Head of INS on Detainee Issue*, Nat'l L.J., Feb. 15, 1999, at A7.

367. *See* Sam Skolnik, *On a Fast Track at the INS*, LEGAL TIMES, May 17, 1999 at 22(1).

368. *See id.* (noting that these refugees have been assigned a "deferred admission" status until their suitability for formal admission has been determined).